(20)

No. 88-1897-CSX
Status: GRANTED

Title: Michigan Department of State Police, et al., Petitioners
v.
Rick Sitz, et al.

Docketed:
May 22, 1989

Court: Court of Appeals of Michigan

Counsel for petitioner: Casey,Thomas L.

Counsel for respondent: Granzotto,Mark R., Gage,William C.

Entry	Date	Note	Proceedings and Orders
1	May 22 1989	G	Petition for writ of certiorari filed.
4	Jun 17 1989		Brief amicus curiae of MAAD in Michigan filed.
3	Jun 19 1989		Order extending time to file response to petition until June 29, 1989.
5	Jun 20 1989		Brief amici curiae of American Alliance for Rights and Responsibilities, et al. filed.
6	Jun 28 1989		Brief of respondents Sitz, et al. in opposition filed.
7	Jul 5 1989		DISTRIBUTED. September 25, 1989
8	Oct 2 1989		Petition GRANTED.
			**********
9	Oct 21 1989		Record filed.
		*	Certified copy of original record received.
10	Nov 14 1989	G	Motion of Insurance Institute for Highway Safety, et al. for leave to file a brief as amici curiae filed.
13	Nov 15 1989	G	Motion of National Organization of Mothers Against Drunk Driving for leave to file a brief as amicus curiae filed.
19	Nov 15 1989		Brief amici curiae of California, et al. filed.
23	Nov 15 1989		Joint appendix filed.
24	Nov 15 1989		Brief of petitioners Michigan Department of State Police, et al. filed.
32	Nov 15 1989		Brief amicus curiae of Michigan MADD filed.
11	Nov 16 1989	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
14	Nov 16 1989	G	Motion of American Alliance for Rights and Responsibilities, Inc., et al. for leave to file a brief as amici curiae filed.
15	Nov 16 1989		Brief amicus curiae of United States filed.
16	Nov 16 1989	G	Motion of National Governors' Association, et al. for leave to file a brief as amici curiae filed.
17	Nov 16 1989		Brief amicus curiae of AFL-CIO filed.
22	Nov 16 1989	G	Motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as amicus curiae filed.
18	Nov 17 1989		Brief amici curiae of Illinois, et al. filed.
20	Nov 17 1989		Record filed.
		*	Certified copy of original record, box, received.
21	Nov 27 1989		Motion of Insurance Institute for Highway Safety, et al. for leave to file a brief as amici curiae GRANTED.
25	Nov 27 1989	D	Motion of Mothers Against Drunk Driving Michigan for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral

2 pp

No. 88-1897-CSX

Entry	Date	Note	Proceedings and Orders
			argument filed.
31	Nov 30 1989	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Dec 4 1989		Motion of National Organization of Mothers Against Drunk Driving for leave to file a brief as amicus curiae GRANTED.
27	Dec 4 1989		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
28	Dec 4 1989		Motion of American Alliance for Rights and Responsibilities, Inc., et al. for leave to file a brief as amici curiae GRANTED.
29	Dec 4 1989		Motion of National Governors' Association, et al. for leave to file a brief as amici curiae GRANTED.
30	Dec 4 1989		Motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as amicus curiae GRANTED.
33	Dec 11 1989		Motion of Mothers Against Drunk Driving Michigan for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
34	Dec 11 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
36	Dec 11 1989		Order extending time to file brief of respondent on the merits until December 28, 1989.
37	Dec 28 1989		Brief of respondents Sitz, et al. filed.
38	Jan 5 1990		CIRCULATED.
39	Jan 5 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 27, 1990. (1ST CASE)
40	Jan 22 1990	X	Reply brief of petitioners MI Dept. St. Police, et al. filed.
41	Feb 27 1990		ARGUED.

88-1897

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

FRANK J. KELLEY
ATTORNEY GENERAL

LOUIS J. CARUSO
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General

PATRICK J. O'BRIEN
Assistant Attorney General
Attorneys for Petitioners

QUESTION PRESENTED

Where the Michigan courts concluded that the proposed Michigan sobriety checkpoint program addresses an issue of legitimate public concern, that it would have some effectiveness, and that objectively it would be only minimally intrusive, is the checkpoint program facially unconstitutional in violation of U.S. Const Amend IV merely because the Michigan courts also found that it would not be as effective as other law enforcement methods and that it would have a potential for generating subjective surprise and fear in some motorists?

LIST OF PARTIES

The parties to the proceedings in the Michigan courts were the same as in this court except that Petitioner Col. R. T. Davis, Director of the Michigan Department of State Police has been automatically substituted pursuant to Supreme Court Rule 40.3 for his predecessor in office, Gerald L. Hough, the former Director.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
INDEX OF AUTHORITIES	iv
OPINIONS BELOW	vi
JURISDICTION	vii
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	viii
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	13
The Constitutionality Of Traffic Sobriety Checkpoints Presents An Important Question Of Federal Law As To Which The State Courts Are In Conflict And Which Should Be Decided By This Court	13
The Constitutional Standard	16
Threshold Level of Effectiveness	23
Less-Restrictive-Alternative Analysis Improper	30
Checkpoints Are Only Minimally Intrusive	32
The State Courts' Reference To The Michigan Constitution Does Not Constitute An Adequate And Independent State Ground Precluding Review By This Court	37
PRAYER FOR RELIEF	41

INDEX OF AUTHORITIES

Page

Cases

Brower v County of Inyo,
___ US ___, 57 USLW 4321 (1989) 16

Brown v Texas,
443 US 47 (1979) .....passim

Delaware v Prouse,
440 US 648 (1979) .....passim

In re Richard T., 185 Cal App 3d
855 (1986), cert den Richard T.
v California, ___ US ___ (1988) 15

Michigan v Long,
463 US 1032 (1983) 37,38,40

National Treasury Employees Union
v VonRaab, ___ US ___,
57 USLW 4338 (1989) .....passim

People v Chapman,
425 Mich 245 (1986) 38

People v Smith,
420 Mich 1 (1984) 38

Sitz v Department of State Police,
170 Mich App 433;
429 NW2d 180 (1988) vi,39

Skinner v Railway Labor Executives
Association, ___ US ___,
57 USLW 4324 (1989) .....passim

South Dakota v Neville,
459 US 553 (1983) 27

Page

South Dakota v Opperman,
428 US 364 (1976) 17

United States v Brignoni-Ponce,
422 US 873 (1975) .....passim

United States v Martinez-Fuerte,
428 US 543 (1976) .....passim

United States v Ortiz,
422 US 891 (1975) 33,36

Statutes

28 USC § 1257(a) vii

MCL 257.625j 1

MCL 257.715 .....viii,2

Constitution

U.S. Const, Amend IV viii

OPINIONS BELOW

The opinion of the Wayne County Circuit Court is not officially reported. A copy of the opinion and order is reproduced in the Appendix beginning at page 26a.

The opinion of the Michigan Court of Appeals is reported as Sitz v Department of State Police, 170 Mich App 433, 429 NW2d 180 (1988). A copy of the opinion is reproduced in the Appendix beginning at page 2a.

The per curiam order of the Michigan Supreme Court denying leave to appeal is not officially reported. A copy of the order is reproduced in the Appendix beginning at page 1a.

JURISDICTION

The trial court's opinion and order were entered June 24, 1986. The Michigan Court of Appeals opinion was entered August 1, 1988. A timely application for leave to appeal was filed in the Michigan Supreme Court and was denied in an order entered February 22, 1989. This Court's jurisdiction is invoked pursuant to 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const, Amend IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

MCL 257.715:

"(1) Equipment on motor vehicles as required under this act shall be maintained as provided in this act. A uniformed police officer may on reasonable grounds shown stop a motor vehicle to inspect the vehicle, and if any defects in equipment are found, issue an appropriate citation under section 728 or 742 to the driver and order the driver to have the defect or defects repaired immediately. In case of an accident a police officer may make an inspection of the vehicles involved in the accident.

"(2) The director of the department of state police shall cause inspection to be made of motor vehicles operating on the public highways to detect defective equipment or other violations of law governing the use of public highways by motor vehicles, operators, and chauffeurs. For that purpose the director may establish temporary vehicle check lanes at appropriate locations throughout the state for checking for inadequacies and violations. A county, city, village, or township police department also may operate a temporary check lane within its limits with the express authorization of the director of the department of state police and under the direct supervision of a designated representative of the director."

Michigan State Police Sobriety Checkpoint Guidelines:

The text of the Guidelines is reproduced in the Appendix beginning at page 132a.

STATEMENT OF THE CASE

The Michigan Drunk Driving Task Force was created by temporary legislation (MCL 257.625j, which expired on September 30, 1985) and was charged with the responsibility of reviewing and making recommendations relative to all aspects of the drunk driving problem in Michigan. In its final report the Task Force made 35 recommendations for combatting alcohol-related traffic accidents, one of which was the implementation of sobriety check lanes.

In his January, 1986, State of the State address, Michigan Governor James J. Blanchard instructed the Department of State Police to initiate a sobriety checkpoint pilot program. This directive was supported by the Office of Highway Safety Planning. In response to Governor Blanchard's directive, Colonel Gerald Hough, Director of the Department of

State Police, set up an advisory committee to develop guidelines for the implementation of the sobriety checkpoint pilot program pursuant to the statutory authority of MCL 257.715. The committee, which included representatives from the Petitioner Department of State Police, county sheriffs' departments, county prosecutors' offices, and the University of Michigan Transportation Research Institute, studied the sobriety checkpoint programs of other states and the state case law which had developed since this innovative police procedure was first implemented. The committee set forth its findings and recommendations in the document referred to as the Sobriety Checkpoint Guidelines, App. 132a.

The goals and objectives of the sobriety checkpoint program as stated in the Guidelines are as follows, App. 146a:

"IV. GOALS

"--Deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents.

"--Conduct checkpoints with a minimal amount of intrusion or motorist inconvenience.

"--Assure the safety of the general public as well as law enforcement officers involved.

"V. OBJECTIVES

"--Increase the perception of 'risk of apprehension' in the minds of those drivers who would operate a vehicle while under the influence of alcohol or controlled substances.

"--Ensure that the constitutionally guaranteed rights of individuals are protected.

"--Remove intoxicated drivers from the public highways."

Under the directives set forth in the Guidelines, each checkpoint operation will be selected by the Michigan Accident Location Index (MALI) computer. The MALI system

specifically pinpoints every accident based upon intersecting roadways. It considers the driver, day of the week, the time, the weather, and any circumstances involving drinking. This system identifies those counties which have a significant alcohol-related accident problem and determines which sections of roadway within the county have the greatest problem.

Once the roadways within a county are identified, Petitioner Department of State Police must review the sites to determine whether they comply with the safety and convenience criteria set forth in the Guidelines, App. 149a.

Each sobriety checkpoint is to be made public through the use of local media prior to the checkpoint operation so as to enhance the deterrent effect among potential drunk

drivers. Although the exact time and location of the sobriety checkpoint will not be made public in advance, their use is expected to receive wide publicity. The actual checkpoint operation is expected to last approximately two to four hours, depending upon the MALI-identified drunk driving period and the activity experienced.

The sobriety checkpoint is set up by placing reflectorized signs announcing in sequential order: "Sobriety Checkpoint Ahead," "Reduce Speed," "One Lane Road Ahead," and "Be Prepared to Stop." These signs are to be set in front of the checkpoint and separated by intervals of 250 to 500 feet. After the third sign, a series of orange cones will be set up to funnel traffic into one lane so that the drivers arrive at the contact point in a single line

of cars. Lighted fusees will be placed between the orange cones for additional illumination of the checkpoint lane. The area where the contact officers are located shall be totally illuminated by portable lighting equipment during evening operations. In addition, contact officers shall use reflectorized vests to increase their visibility. The opposite lane of traffic will not be checked; however, it will be slowed and funneled into one lane as an additional safety measure.

Director Hough testified that an additional criteria not set forth in the Guidelines is that the site selected must afford the driver the opportunity to make a legal and safe U-turn.

The essential aspects of the checkpoint operation are described as follows, App. 161a:

"Officers will be assembled in the roadway to check motorists for articulable signs of intoxication. These officers will wear department-issued reflectorized vests and utilize orange cones attached to their flashlights for traffic direction and control.

"All traffic entering the checkpoint will be stopped. A uniformed police officer will approach the motorist and state, 'I am Trooper (Officer) _____ of the Michigan State Police (local police department). You have entered a sobriety checkpoint set up to identify intoxicated drivers.' If there is no immediate evidence of intoxication, a traffic safety informational brochure and survey card will be given to the motorist.

"During the brief stop, the officer will look for articulable signs of intoxication such as an odor of alcohol about the driver, slurred speech, and other behavior normally associated with OUIL or OUID violators. If the officer observes symptoms of intoxication, the driver will be directed to a predetermined 'safe area' for further investigation. If the situation warrants, the driver will be asked to submit to a preliminary breath test; and if sufficient evidence of intoxication is observed, the driver will be arrested."

Maryland performed a public survey during its sobriety checkpoint operation which was

implemented on December 17, 1982, during National Drinking and Driving Awareness Week. The Maryland survey found that 97% of the motorists were not significantly delayed in their journey, over 90% of the motorists believed that sobriety checkpoints will deter people from driving while intoxicated, 90% believed sobriety checkpoints would increase a drunk driver's risk of being detected and arrested, and 87% of the motorists who responded approved of using sobriety checkpoints to detect and deter drunk drivers. Michigan has utilized the Maryland sobriety checkpoint as its model in setting up its own program.

This first sobriety checkpoint operation conducted by Petitioner Department of State Police on May 17, 1986, was a successful operation. Despite the fact this checkpoint

was closed down after less than one hour of operation due to inclement weather, the checkpoint was able to accommodate 126 vehicles with an average time of delay to the motorists of 25 seconds or less. Acceptance by the people going through the checkpoint was favorable as evidenced by the fact that none of the drivers appeared ill at ease and everyone cooperated with the officers. The checking of these 126 drivers resulted in the detaining of two drivers for sobriety field tests and the arrest of one driver for driving while under the influence of alcohol. Another driver ran through the sobriety checkpoint and was subsequently stopped by the officer in the observation vehicle and arrested for driving while under the influence of alcohol. There were no accidents, injuries, or altercations reported. This operation resulted in

extensive media coverage as expected and encouraged by the law enforcement agencies involved.

Respondents filed a Complaint in the Wayne County Circuit Court on May 16, 1986, alleging that the checkpoints violated both the United States Constitution and the Michigan Constitution and requesting a preliminary injunction against the use of sobriety checkpoints. Petitioners stipulated that no further sobriety checkpoints would be conducted pending the outcome of the litigation.

The trial court held an evidentiary hearing and then issued an opinion and order (App. 26a) holding the checkpoint procedure unconstitutional. The Michigan Court of Appeals affirmed (App. 2a) and the Michigan Supreme Court denied leave to appeal

(App. 1a). The state courts applied a balancing test pursuant to Brown v Texas, 443 US 47 (1979) and purported to weigh the gravity of the public concerns served by the checkpoints, the degree to which they advanced the public interest, and the severity of their interference with individual liberty. The courts concluded that there was an undisputed serious and legitimate public interest in curbing drunk driving (App. 13a, 72a-74a); that the checkpoints had some effectiveness in apprehending drunk drivers (App. 14a-20a, 123a); and that objectively the intrusion on individual liberties caused by the checkpoints was minimal (App. 21a, 103a). The state courts found the checkpoint procedures to be unconstitutional, however, because they concluded that, although there was a short-term deterrent effect on drunk

driving, there was no long-term deterrence (App. 92a, 14a-15a); because they felt that other law enforcement methods would be more effective (App. 19a-20a, 95a-101a); and because they believed that subjectively the checkpoints had the potential to generate surprise or fright in some motorists (App. 21a-22a, 104-110a).

REASONS FOR GRANTING THE WRIT

The Constitutionality Of Traffic Sobriety Checkpoints Presents An Important Question Of Federal Law As To Which The State Courts Are In Conflict And Which Should Be Decided By This Court.

This case involves a facial Fourth Amendment challenge to a police procedure for limited stops of all automobiles passing through fixed traffic checkpoints established at predetermined locations for limited duration in order to apprehend drivers under the influence of alcohol or drugs and to deter others from drinking and driving. This Court has not yet ruled explicitly on the constitutionality of such procedures, although it has discussed applicable principles in the contexts of random automobile seizures, Delaware v Prouse, 440 US 648 (1979), United States v Brignoni-Ponce, 422 US 873 (1975), Brown v

Texas, 443 US 47 (1979), fixed border checkpoints seizures, United States v Martinez-Fuerte, 428 US 543 (1976), and in the recent drug testing cases, Skinner v Railway Labor Executives Association, ___ US ___, 57 USLW 4324 (1989), National Treasury Employees Union v VonRaab, ____ US ____, 57 USLW 4338 (1989).

The Michigan traffic checkpoint procedures were developed after carefully studying similar programs in other states, and the procedures were carefully designed to overcome infirmities which had invalidated some such programs. The ruling of the Michigan courts in the instant case purports to be a comprehensive Fourth Amendment analysis of traffic sobriety checkpoint procedures and the decision of unconstitutionality here is clearly in

conflict with the decisions of other state courts of last resort which have found traffic sobriety checkpoint procedures to be constitutional, particularly In re Richard T., 185 Cal App 3d 855 (1986), cert den Richard T. v California, ___ US ___ (1988). A listing of states which have considered the constitutionality of sobriety checkpoints is contained at App. 165a-168a.

Given the magnitude of the problem of drinking and driving in this country, the number of states which have attempted to address the problem by implementing sobriety checkpoints and the conflicting results of those efforts, and the importance of obtaining nationwide uniformity as to the constitutionality under the Fourth Amendment of such procedures, Petitioners submit that the issue in this case is sufficiently

important and that there is sufficient conflict between the states to warrant review by this Court.

The Constitutional Standard

It is undisputed that the limited stops of automobiles at the Michigan traffic sobriety checkpoints constitute seizures implicating Fourth Amendment rights. United States v Martinez-Fuerte, supra, 428 US at 556. See also Brower v County of Inyo, ___ US ___, 57 USLW 4321, 4322 (1989) (a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied"). The governing principles after the Fourth Amendment has been found applicable were recently summarized in Skinner v Railway Labor Executives Association, supra, 57 USLW at 4328:

"To hold that the Fourth Amendment is applicable to the drug and alcohol testing prescribed by the FRA regulations is only to begin the inquiry into the standards governing such intrusions. *** For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. *** What is reasonable, of course, 'depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' *** Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interest.'" (Citations omitted).

Automobiles have traditionally been treated differently than homes for Fourth Amendment purposes, because of the inherent mobility of automobiles and because "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." South Dakota v Opperman, 428 US 364, 367 (1976) (footnote omitted). In Opperman this Court noted that the expectation of privacy with

respect to automobiles "is further diminished by the obviously public nature of automobile travel" and also noted that automobiles are subjected to "pervasive and continuing governmental regulation and controls" and that as part of their responsibility for ensuring public safety, law enforcement officials are brought into frequent contact with automobiles including circumstances where police stop and examine vehicles "as an everyday occurrence". 428 US at 368.

The Court has had frequent opportunity to discuss Fourth Amendment principles applied to automobile seizures in the context of border searches, both by roving patrols and at fixed checkpoints. In United States v Brignoni-Ponce, 422 US 873 (1975), the Court considered a case in which two officers were parked by the side of the highway using their

headlights to illuminate passing cars so that they could view the occupants and determine if any appeared to be of Mexican descent. The Court held that the Fourth Amendment prohibits the use of roving patrols to search vehicles without a warrant or probable cause at points removed from the border. In United States v Martinez-Fuerte, 428 US 543 (1976), however, the Court considered whether the Fourth Amendment is violated where a vehicle is stopped at a fixed checkpoint for brief questioning of its occupants, even though there was no reason to believe the particular vehicle contained illegal aliens. The Court concluded that such checkpoint stops are seizures within the meaning of the Fourth Amendment, but also concluded that under the circumstances, the intrusion was minimal and the governmental interests outweighed the privacy interests and therefore such seizures are constitutional.

In Delaware v Prouse, 440 US 648 (1979), the Court reviewed Brignoni-Ponce, supra, and Martinez-Fuerte, supra, in a case where a patrolman randomly stopped a vehicle to check the driver's license and car registration even though he had not observed a traffic or equipment violation or any suspicious activity. Although the Court held that random discretionary stops by police officers require articulable and reasonable suspicion, the Court went on to say, 440 US at 663:

> "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at road block-type stops is one possible alternative."
> (Footnote omitted).

This statement is similar to language in Martinez-Fuerte, supra, 428 US at 560, fn 14, where the Court noted that the use of

checkpoints for automobile seizures is commonplace:

> "Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding driver's licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendant's position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use."

In Brown v Texas, 443 US 47 (1979), where a random stop-and-identify statute was held unconstitutional, the Court observed that a "central concern" in assessing the reasonableness of a traffic stopping scheme is

"that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." 443 US at 51. To this end, Brown requires that a seizure be based upon specific objective facts or "that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." 443 US at 51. The Court identified factors to be used in evaluating the constitutionality of such seizures, 443 US at 50-51:

> "The reasonableness of seizures that are less intrusive than a traditional arrest ... depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *** Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty." (Citations omitted).

In the instant case, the Michigan courts purported to apply the Brown factors, but Petitioners submit that the state courts distorted the analysis by giving undue consideration to their view of the effectiveness of the checkpoint procedures, particularly in applying a less-restrictive-alternative analysis in comparison to other police procedures and by relying on pure speculation with respect to the supposed subjective intrusiveness of the checkpoint procedures. The state courts' finding of unconstitutionality thus is in conflict with applicable principles in other decisions of this Court.

Threshold Level of Effectiveness

A principal basis for the Michigan courts' decision was that although they

agreed that the checkpoints were somewhat effective, they felt that the procedures were not effective enough. This conclusion is clearly contrary to principles enunciated by this Court. As shown by the single checkpoint procedure which was implemented in Michigan, as well as by the statistics in other reported cases, traffic sobriety checkpoints result in the apprehension of persons charged with drunk driving in approximately 1% of the vehicles which go through the checkpoints. App. 79a-82a. In addition, the state courts acknowledged evidence in this record which indicated at least short-term deterrent effects from such checkpoints, although the long-term deterrent effects were questionable. App. 14a-20a, 92a, 123a.

Petitioners submit that where, as here, the nature of the public interest is very

substantial and the intrusiveness of the seizure is minimal, the constitutionality of the seizure can be sustained without requiring a showing of the heightened level of effectiveness mandated by the state courts. This Court's cases support this interpretation, as shown most recently in National Treasury Employees Union v VonRaab, supra, 57 USLW at 4343, where it was contended, among other things, that a drug testing program was unjustified and therefore unreasonable because no more than five employees out of 3,600 tested positive for drugs. The Court evaluated this contention in light of the safety and security hazards which the program addressed and categorically rejected the challenge, 57 USLW at 4343:

> "The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless

housing code inspections, see Camara v Municipal Court, 382 US 523 (1967), and of motorists who are stopped at the checkpoints we approved in United States v Martinez-Fuerte, 428 US 543 (1976). *** Where, as here, the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal." (Footnote omitted).

In the footnote to the foregoing quotation, the Court analogized to the required search of all passengers seeking to board commercial airliners as well as the search of their carry-on luggage and observed, 57 USLW at 4343, fn 3:

> "When the government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success."

The gravity of the public concern which is at issue in the instant case is undisputed.

This Court has made reference to it in South Dakota v Neville, 459 US 553, 558 (1983), in the course of holding that the admission into evidence of refusal to take a blood-alcohol test did not violate constitutional rights:

> "The situation underlying this case--that of the drunk driver--occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here."

In Railway Labor Executives Association, supra, 57 USLW 4324, this Court approved a program of breath, urine and blood testing for drugs and alcohol which constituted searches far more intrusive than the limited seizures at issue in this case. Individualized suspicion was not required because the "important government interest furthered by the intrusion" outweighed the "minimal" privacy interest at stake,

particularly in an area which is "regulated pervasively to ensure safety." 57 USLW at 4330.

> "This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also 'require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed.'"
> 57 USLW at 4329. (Citation omitted).

In Railway Labor Executives Association, supra, the testing program was based in large part on the fact that in the nine-year period from 1972 to 1983 nationwide statistics showed there were at least 21 significant train accidents involving drug or alcohol use which resulted in 25 fatalities, 61 non-fatal injuries and property damage of $19 million, 57 USLW at 4325. In the instant case, by comparison, the advisory committee which

developed the guidelines for the Michigan sobriety checkpoint program cited the following statistics, App. 140a:

> "Michigan 1984 alcohol-related traffic crash statistics reveal that 800 persons died, 28,681 suffered personal injury, with a total economic cost of $351,959,000."

In National Treasury Employees Union, supra, the positive drug testing rate was slightly more than one-tenth of one per cent. That is virtually the same as the percentage of vehicles found to contain deportable aliens at the checkpoint in Martinez-Fuerte, 428 US at 554 (171 vehicles out of 146,000). The airport searches discussed in footnote 3 of National Treasury Employees Union found only 42,000 firearms out of approximately 19.5 billion searches of persons and pieces of luggage (0.0002%). Those statistics should be compared to the success rate of sobriety checkpoints which approximates 1%.

The success rate of apprehending drunk drivers must also be evaluated in light of the fact that the features of the program which reduce its effectiveness--such as advance publicity, limited operation, and the opportunity to avoid the checkpoint entirely--are the same factors which reduce the intrusiveness of the seizure itself. The irony of this was noted in National Treasury Employees Union v VonRaab, supra, 57 USLW at 4344, fn 4.

Less-Restrictive-Alternative Analysis Improper

To the extent that the state courts evaluated the effectiveness of the sobriety checkpoint procedure in comparison to other police procedures, its decision clearly violates the principle that such less-restrictive-alternative arguments are

inapplicable in the search and seizure context. In United States v Martinez-Fuerte, 428 US at 556, fn 12, the Court specifically rejected such an argument:

> "The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure powers."

The inapplicability of this type of analysis was recently reaffirmed in Railway Labor Executives Association, supra, 57 USLW at 4331, fn 9, where the Court again rejected such an argument:

> "We have repeatedly stated, however, that '[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.' *** It is obvious that '[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers,' ... because judges engaged in post hoc evaluations of government conduct 'can almost always imagine some alternative means by which the objectives of the [Government] might

have been accomplished.'"
(Citations omitted).

Railway Labor Executives Association also observed that in a facial constitutional challenge such as the instant case, the question is "whether the tests contemplated by the regulations can ever be conducted", 57 USLW at 4332 (emphasis in original).

Checkpoints Are Only Minimally Intrusive

Despite concluding that the sobriety checkpoints resulted in only minimal objective intrusion, the state courts also erred in giving determinative weight to their own perception of the potential subjective nature of the intrusion. The state courts held that even though the nature and duration of the seizure were objectively reasonable, the checkpoints were unconstitutional because

of the potential that someone might experience surprise or fear. Such a conclusion is without factual support in this record, gives improper weight to this factor of the analysis, and is directly contrary to conclusions of this Court that checkpoint stops are not subjectively intrusive.

This Court has had several occasions to evaluate the intrusiveness of various types of traffic stops. In United States v Brignoni-Ponce, supra, the Court held unconstitutional the practice of roving patrols. In United States v Ortiz, 422 US 891, 894-895 (1975), however, the Court observed that the seizures at traffic checkpoints are "far less intrusive" than those at roving patrol stops:

"At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officer's authority, and he is much less likely to be frightened or annoyed by the intrusion."

Similarly in United States v Martinez-Fuerte, supra, 428 US at 558-559, the Court reiterated that the subjective intrusion at checkpoint stops is "appreciably less" than the intrusion caused by roving patrols:

> "Routine checkpoint stops do not intrude similarly upon the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for

> abusive or harrassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial reivew." (Footnote omitted).

See also Delaware v Prouse, supra, 440 US at 657.

The only difference between the sobriety checkpoints at issue in the instant case and the checkpoints at issue in Martinez-Fuerte is that Michigan's sobriety checkpoints are not operated at permanent locations and their exact locations are not publicized in advance. Unlike a roving patrol, however, while a sobriety checkpoint is in operation its location is fixed, the duration of its operation is limited to a few hours, and the duration of each seizure is limited to a few seconds. Similarly, the existence of checkpoints in a general area is publicized

in advance and each checkpoint is operated in such a manner, by way of advance signs, lights, and fusees, for example, that its location cannot be deemed a surprise to a motorist. In sum, the operation of the Michigan sobriety checkpoints is, for constitutional purposes, virtually identical to the checkpoints at issue in Martinez-Fuerte and is unlike the roving patrols at issue in Prouse. The Michigan courts' decision to the contrary is unsupported by any evidence in this record and is contrary to the principles enunciated in Ortiz, Martinez-Fuerte, and Prouse.

The State Courts' Reference To The Michigan Constitution Does Not Constitute An Adequate And Independent State Ground Precluding Review By This Court.

In Michigan v Long, 463 US 1032, 1040-1041 (1983), this Court said that when a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion" the Court will assume that the state court believed that federal law required the decision. A "plain statement" to the contrary would preclude review by this Court, 463 US at 1041:

> "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

In the instant case the trial court concluded that the Michigan Constitution

provided greater protection than the Fourth Amendment to the U.S. Constitution and cited Michigan v Long while purporting to establish an adequate and independent state law ground for its decision invalidating the sobriety checkpoint procedure. App. 130a-131a and fn 18. Petitioners submit that this conclusion is clearly wrong as a matter of state law since the Michigan Constitution does not provide greater protections, see People v Smith, 420 Mich 1, 18-20, 26-28 (1984) and People v Chapman, 425 Mich 245, 252-253 (1986), but in any event the question is irrelevant here, since the Michigan Court of Appeals explicitly chose not to consider the issue whether the Michigan Constitution provides greater protections. The Court of Appeals affirmed the judgment that the Michigan Constitution was violated by the checkpoint procedures, but only because the

Michigan Constitution "offers at least the same protection as accorded by the Foruth Amendment and we have already found the checkpoint program to be an unreasonable seizure under the Fourth Amendment." Sitz v Department of State Police, supra, 170 Mich App at 445; App. 24a.

Ironically, this language pertaining to the state constitution is almost identical to language used by the state court and discussed in Delaware v Prouse, 440 US 648, 652 fn 4, 651-653 (1979). This Court concluded that the reference to the state constitution did not constitute an adequate and independent state ground since "the state constitutional holding depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments." 440 US at 653. The same result should obtain here.

In the instant case, just as in Michigan v Long, 463 US at 1043-1044:

> " ... the court below relied exclusively on its understanding of ... federal cases. Not a single state case was cited to support the state court's holding that the search ... was unconstitutional.
>
> "*** The references to the State Constitution in no way indicate that the decision below rested on grounds in any way independent from the state court's interpretation of federal law. Even if we accept that the Michigan Constitution has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law.
>
> "*** It appears to us that the state court 'felt compelled by what it understood to be federal constitutional considerations to construe ... its own law in the manner it did.'"
> (Emphasis in original, citations and footnotes omitted).

The reference to the Michigan Constitution in the state court opinions does not constitute an adequate and independent state ground precluding review by this Court.

PRAYER FOR RELIEF

It is undisputed that there is a grave and legitimate public interest in curbing drunk driving. The Michigan sobriety checkpoint procedure has some effectiveness in addressing this problem and the operations of the checkpoints results in only minimal intrusiveness to the motoring public. Thus, despite the fact that the sobriety checklanes may not be the most effective police procedure available to fight drunk driving and despite the fact that there may be some potential for generating fear or surprise in some motorists, the sobriety checkpoint procedures do not violate the Fourth Amendment.

WHEREFORE, this Court should grant certiorari to review the judgment of the Michigan Court of Appeals and should hold

that the Michigan sobriety checkpoint program is consistent with the Fourth Amendment to the United States Constitution.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record
752 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Thomas L. Casey
Assistant Solicitor General
Patrick J. O'Brien
Assistant Attorney General

APPENDIX

APPENDIX

TABLE OF CONTENTS

	Pages
Michigan Supreme Court Order Dated February 22, 1989	1a
Michigan Court of Appeals Opinion Dated August 1, 1988	2a
Wayne County Circuit Court Order Dated June 24, 1986	26a
Wayne County Circuit Court Opinion Dated July [sic] 24, 1986	28a
Michigan State Police Sobriety Checkpoint Guidelines	133a
State Court Appellate Decisions Concerning Roadside Sobriety Checkpoints	165a

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: February 22, 1989

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Plaintiffs-Appellees,

v

MICHIGAN DEPARTMENT OF STATE POLICE and DIRECTOR OF THE MICHIGAN DEPARTMENT OF STATE POLICE,

Defendants-Appellants.

SC: 83992
COA: 93828
LC: 86-613063-NZ

On order of the Court, the application for leave to appeal, the motion for leave to appear as amicus curiae and the motion for an extension of time in which to answer the application are considered. The motion for leave to appear as amicus curiae is GRANTED. The motion for an extension of time in which to answer the application is also GRANTED. The application for leave to appeal is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Riley, C.J., and Boyle, J., would grant leave to appeal.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 22, 1989 /s/ Jacqueline B. MacKinnon
Deputy Clerk

STATE OF MICHIGAN

COURT OF APPEALS

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Plaintiffs-Appellees,

v

MICHIGAN DEPARTMENT OF STATE POLICE and GERALD L. HOUGH, Director of the Michigan Department of State Police,

Defendants-Appellants.

AUGUST 1, 1988

No. 93823

Before: Gribbs, P.J., and Holbrook, Jr., and N.J. Lambros,* JJ.

N.J. LAMBROS, J.

This case presents the question of the constitutionality of sobriety checkpoints. Although this issue has been addressed by the courts of over one-half of the states in this country, the Michigan appellate courts have not before now had

occasion to consider this important issue.[1] In a comprehensive 60-page opinion following a bench trial of this case, Wayne Circuit Court Judge Michael L. Stacey concluded that the defendants' sobriety checkpoint plan violated both the Fourth Amendment of the US Constitution and art 1, 11 of the Michigan Constitution. The court accordingly entered an order permanently enjoining defendants from implementing their plan to conduct sobriety checkpoints along state highways. We affirm.

I

1982 PA 310 established the Michigan Drunk Driving Task Force in the Department of State Police, MCL 257.625j; MSA 9.9325(10). The Task Force was charged with reviewing all aspects of the drunk driving problem in the state. In September 1985, the Task Force

submitted its final report which set forth thirty-five recommendations for combating alcohol-related traffic accidents. One suggestion was the implementation of sobriety checkpoints on public highways. Due to legislative opposition, defendants did not attempt to implement sobriety checkpoints at that time.

In his State of the State Address on January 29, 1986, Governor Blanchard directed defendants to implement a sobriety checkpoint pilot program. In February 1986, defendant Gerald L. Hough, Director of the Michigan Department of State Police, appointed a Sobriety Checkpoint Advisory Committee, composed of representatives of the State Police, local law enforcement officials, prosecuting attorneys, and the University of Michigan Transportation Research Institute. The committee drafted guidelines for the program.

The guidelines set forth procedures as to site selection, publicity, and operation of the checkpoint, including briefing, scheduling, safety considerations, motorist contact, staffing and assignment of duties.

Under the program, checkpoints would be established at certain sites along state highways. All motorists would be stopped upon reaching a checkpoint and would be examined for signs of intoxication. Should the examining officer find indications of intoxication, the officer would direct the driver to an out-of-traffic location, check the driver's license and car registration, and possibly conduct further sobriety tests, including a breathalyzer test. If the officer concluded that the driver was intoxicated, the officer would have discretion to arrest the driver; should the officer conclude the driver was not intoxicated, the

driver was to be released.

The first sobriety checkpoint operation was conducted at Dixie Highway and Gretchen Road in Saginaw County on May 17 and 18, 1986. The Saginaw County Sheriff's Department cooperated in the operation which lasted from about 11:45 p.m. to 1:00 a.m. One hundred twenty-six vehicles passed through the checkpoint in that time, with an average delay to motorists of twenty-five seconds or less. Two drivers were retained for sobriety field tests; one was arrested for driving while under the influence of alcohol. A third driver drove through the checkpoint without stopping, was pulled over by an officer in an observation vehicle, and was arrested for driving under the influence.

This action was commenced on May 16, 1986, with the filing of plaintiffs' complaint for a declaratory judgment and

injunctive relief. Plaintiffs are licensed drivers of the state of Michigan who regularly travel throughout the state in their automobiles. During the course of the initial proceedings, defendants agreed to delay implementation of the sobriety checkpoint program pending resolution of the case.

Trial took place from May 29, 1986 through June 3, 1986. In its opinion dated June 24, 1986, the trial court found that although there was statutory authority for the operation of the sobriety checkpoints, the plan violated the Fourth Amendment of the United States Constitution and art 1, 11 of the Michigan Constitution. Defendants challenge both these findings on appeal.

II

The Fourth Amendment to the United States Constitution provides in pertinent part:

> "The right of the people to be secure in their persons ... and effects, against unreasonable searches and seizures, shall not be violated."

The United States Supreme Court has distinguished the high expectation of privacy an individual has in a home from the lesser privacy interest in an automobile. South Dakota v Opperman, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1975). As a result, the Fourth Amendment does not afford the same level of protection against warrantless searches and seizures of automobiles as of a residence. Chambers v Maroney, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970), reh den 400 US 856; 91 S Ct 23; 27 L Ed 2d 94 (1970). Nonetheless, stopping a vehicle and detaining its occupants is a seizure within the meaning of the Fourth Amendment. Delaware v Prouse, 440 US 648, 653; 99 S Ct 1391; 59 L Ed 2d 660 (1979).

The Supreme Court first considered the use of road blocks for investigatory stops in two border patrol cases. In United States v Brignoni-Ponce, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975), two officers on roving patrol stopped a vehicle to determine whether it was transporting illegal aliens. The officers admitted they had no reason to suspect the car was being used for illegal purposes. The Court held that while probable cause is not required for such a stop, the Border Patrol could not arbitrarily stop automobiles without some grounds:

> "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrants suspicion the vehicles contain aliens who may be illegally in the country." United States v Brignoni-Ponce, supra, 422 US 884.

In reaching its decision, the Court weighed the state's interest in preventing

illegal immigration and the effectiveness of such stops in combating the problem against a brief delay and minimal intrusion imposed on motorists.

In United States v Martinez-Fuerte, 428 US 543; 96 S Ct 3074; 49 L Ed 2d 1116 (1976), the Court held that permanent checkpoints on major highways near the Mexican border were constitutional. Such checkpoints stopped all vehicles and the occupants were questioned briefly in an effort to apprehend illegal aliens. Though still a seizure, the Court concluded that the governmental interest in stemming illegal immigration outweighed the minimal intrusion made on motorists. United States v Martinez-Fuerte, supra, 428 US 564. The Court again reviewed the Public interest served, whether the procedure was an effective approach to the problem, and the objective and subjective

intrusion on an individual's privacy interest.

In Brown v Texas, 443 US 47, 50-51; 99 S Ct 2637; 61 L Ed 2d 357 (1979), the Supreme Court synthesized the factors to be considered in determining the constitutionality of seizures less intrusive than traditional arrests:

> "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

III

The trial court employed the Brown test, balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused

by the checkpoints. The parties to this appeal agree, as do we, that the Brown three-prong balancing test was the correct test to be used to determine the constitutionality of the sobriety checkpoint plan. Applying the Brown test to the evidence presented, the trial court concluded that although there is a grave and legitimate state interest in curbing drunk driving, the sobriety checkpoint program did not significantly further the public interest in curbing drunk driving and subjectively intruded on individual liberties. It is the latter two findings that defendants claim are erroneous.

In reviewing the trial court's findings, we are mindful that the findings of fact by the trial court are not to be set aside unless they are clearly erroneous. MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support

it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed. Tuttle v Dep't of State Highways, 397 Mich 44, 46; 243 NW2d 244 (1976). Due regard shall be given to the special opportunity of the trial court to judge the credibility of the trial witnesses.

A

The gravity of the drunk driving problem in the state of Michigan is undeniable. The evidence presented at trial indicated that alcohol was a contributing factor in somewhere between twenty-five percent and fifty percent of motor vehicle fatalities. It is undisputed that the state has a serious and legitimate interest in curbing drunk driving.

B

In concluding that sobriety checkpoints were not an effective means of combating drunk driving, the trial court found: (1) the degree to which a sobriety checkpoint program would deter drunk driving was directly related to the program's success in achieving actual arrests; (2) sobriety checkpoints were not an effective means of actually apprehending drunk drivers; and (3) the statistical data and testimony presented at trial demonstrated, at most, a short-term deterrent impact of sobriety checkpoint programs. We are convinced from our review of the evidence presented at trial that the trial court's findings were not clearly erroneous.

Specifically, the trial court's finding of a causal relationship between a program's success in achieving actual arrests and deterrence was supported by the testimony

of plaintiffs' expert witness, Dr. Lawrence Ross, who has extensively researched issues relating to drinking and driving. Ross testified that available data indicated that one percent or fewer of the drivers passing through sobriety checkpoints are arrested for drunk driving. He further indicated that while studies indicated a short-term deterrent effect resulting from various campaigns against drunk driving, the statistics eventually returned to their normal level. Ross' explanation for this phenomenon was that while the publicity which accompanies the initiation of such programs leads the public to believe that the chances of being caught are high, once people learn that the chances of apprehension are not that high, people return to their normal behavior.

Addi ionally, defendants' own evidence strongly supports the finding of a

causal relationship between actual arrests and deterrence value. Part II of the Sobriety Checkpoint Program Guidelines states in pertinent part:

> "Therefore, if drunk driving is to be reduced significantly through law enforcement efforts, motorists must be persuaded that if they drive while intoxicated, there is a strong likelihood they will be arrested and face the ensuing consequences. Authorities agree that many drunk drivers persist in their behavior because of a perceived low risk of arrest."
>
> Similarly, the first objective listed in part V of the guidelines is to "[i]ncrease the perception of 'risk of apprehension' in the minds of those drivers who would operate a vehicle while under the influence of alcohol or controlled substances."

Finally, we note that the ability of a particular law enforcement technique to effectuate actual arrests was deemed a relevant factor by the United States Supreme Court in its analyses in United States v Martinez-Fuerte, supra, p 554, and Delaware v

Prouse, supra, p 660. Based on our review of the record, the trial court's conclusion that the deterrent effect of the program would decline with the public's learning that the program was not, in fact, an effective tool for arresting drunk drivers, was not clearly erroneous.

Secondly, the court's finding that checkpoint programs were not an effective means for achieving actual arrests is supported by uncontroverted evidence. Dr. Ross' testimony regarding the low actual arrest rate of checkpoint programs was corroborated by the testimony of one of defendants' witnesses, Lieutenant Raymond Cotten of the Maryland State Police. The Michigan program was modeled after the Maryland program. Colonel Hough testified to his understanding that other states which had tried checkpoint programs were not achieving high rates of

actual arrests from the programs. The trial court additionally noted that the figures reported in appellate decisions of other states reflect the fact that checkpoint program yield very low drunk driving arrest rates. The court's finding that checkpoint programs are not an effective means for achieving actual arrests is not clearly erroneous.

The trial court carefully examined the evidence presented as to the deterrent effect of sobriety checkpoints. While Dr. Ross acknowledged the potential for a short-term deterrent effect of a program supported by adequate publicity, he testified that he knew of no credible studies demonstrating that sobriety checkpoints were an effective technique for long-term deterrence of alcohol-related fatalities. Colonel Hough acknowledged that he had not seen empirical

evidence showing a strong deterrent effect. Lieutenant Cotten admitted, as well, that he was unable to opine that checkpoints had a statistically significant deterrent effect. In fact, Maryland had conducted a study comparing traffic statistics between a county using checkpoints and a control county. The results of the study showed that alcohol-related accidents in the checkpoint county decreased by ten percent, whereas the control county saw an eleven percent decrease. And while fatal accidents in the control county fell from sixteen to three, fatal accidents in the checkpoint county actually doubled from the prior year.

The trial court also appropriately considered evidence presented on alternatives to checkpoints. In examining the extent to which the challenged seizure advances the public interest sought to be served, courts

should examine the availability of alternative procedures which can be more properly used. Delaware v Prouse, supra, p 655. The then-sheriffs of Macomb County, Kalamazoo County, and Wayne County all testified as to other means used in their counties to combat drunk driving and as to their respective opinions that other methods currently in use, e.g., patrol cars, were more effective means of combating drunk driving and utilizing law enforcement resources than sobriety checkpoints. Once again, based on our review of the record, we do not believe the trial court clearly erred in finding that sobriety checkpoints were not an effective means of combating drunk driving.

C

Following the Brown analysis, the trial court finally examined both the objec-

tive and subjective nature of the intrusion caused by sobriety checkpoints. Although the court found the objective intrusion, measured by the duration of the seizure and intensity of the investigation, to be minimal, the court found the subjective intrusion on individual liberty interests to be substantial.

In considering the degree of subjective intrusion, the court reviewed two factors as set forth in United States v Martinez-Fuerte, supra, p 558, (1) the potential of the checkpoints to generate fear and surprise to motorists, and (2) the degree of discretion left to individual officers. While the court found that the guidelines established to implement the checkpoints minimized on-the-scene officers' discretion, the court concluded that the checkpoints had the potential to generate fear and surprise to motorists. The court was unpersuaded by

defendants' contention that the level of surprise was minimized because motorists would be able to turn around prior to entering a checkpoint where the evidence showed the absence of any provision to alert the public to the option of turning around to avoid a checkpoint and the further absence of a provision ensuring that the checkpoints would be located where motorists could safely and legally make U-turns or turn-offs. The trial court did not clearly err in finding the potential for an unreasonable subjective intrusion on individual liberty interests.

D

The record discloses no basis for disturbing the trial court's factual findings. Moreover, such findings were made in the context of an examination under the legal standard adopted by the United States

Supreme Court for determining the constitutionality of seizures less intrusive than traditional arrests. In finding defendants' sobriety checkpoint plan to be violative of the Fourth Amendment of the United States Constitution, we fully recognize the genuine and serious drunk driving problem in Michigan and our state's interest in implementing methods designed to curb drunk driving. It is the duty of our courts to ensure, however, that governmental activities undertaken to promote the public interest satisfy constitutional standards. While the goals of the sobriety checkpoint program are laudable, the program fails to qualify as a reasonable seizure under the Fourth Amendment. Accordingly, we affirm the trial court's order enjoining defendants from implementing the program.

IV

The trial court also found defendant's sobriety checkpoint program violative of art 1, 11 of the Michigan Constitution. Defendants contend that the court, in making its finding, concluded that art 1, 11 offers greater protection than the Fourth Amendment of the federal constitution and that such a construction of the state constitutional provision is erroneous.

We find it unnecessary to consider this issue because art 1, 11 offers at least the same protection as accorded by the Fourth Amendment and we have already found the checkpoint program to be an unreasonable seizure under the Fourth Amendment. Therefore, we affirm the trial court's finding that defendants' sobriety checkpoint program is an unreasonable seizure under

art 1, 11 of the Michigan Constitution.

Affirmed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Nicholas J. Lambros

[1]In People v Whalen, 390 Mich 672, 683; 213 NW2d 116 (1975), the Michigan Supreme Court expressly declined to rule on the constitutionality of systematic road block stops.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Plaintiffs,

vs NO: 86-613-063-CZ

THE MICHIGAN DEPARTMENT OF STATE POLICE and GERALD L. HOUGH, Director of the Michigan State Police,

Defendants.

ORDER

At a session of said Court, held in the City-County Building, Detroit, Michigan, on JUNE 24, 1986.

PRESENT: THE HONORABLE MICHAEL L. STACEY
Circuit Court Judge

The Court being fully informed in the premises, and for the reasons stated in the foregoing Opinion,

IT IS HEREBY ORDERED AND ADJUDGED that defendants' plan as reflected in the aforementioned Guidelines, to conduct sobriety checkpoints is declared to be violative of United States Constitution, Amendment IV, and Michigan Constitution 1963, Article 1, Section Eleven.

IT IS FURTHER ORDERED AND ADJUDGED that defendants, their agents and employees, be and they are, permanently restrained and enjoined from implementing the aforementioned plan to conduct sobriety checkpoints.

MICHAEL L. STACEY
MICHAEL L. STACEY, Judge
Third Judicial Circuit Of Michigan

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Plaintiffs

vs NO. 86-613-063-CZ

MICHIGAN DEPARTMENT OF STATE POLICE and GERALD L. HOUGH, Director of the Michigan State Police,

Defendants.
_____/

OPINION OF THE COURT

THE HONORABLE MICHAEL L. STACEY
(P20866)

I. INTRODUCTION

A. Procedural History

This is an action for declaratory judgment and injunctive relief. In the complaint, plaintiffs[1] challenge the validity of a plan of the Michigan Department of State Police and its director Colonel Gerald L. Hough, the defendants herein, whereby the State Police, along with other police agencies, would be directed to establish checkpoints on state trunklines, the purpose of which would be to "monitor traffic for driver sobriety" (Complaint ¶ 16; Complaint, Exhibit B, p 4). Plaintiffs contest the validity of the plan on essentially two grounds. First, plaintiffs assert that the plan is violative

[1]The action is prosecuted on behalf of six individuals, all of whom are alleged to be licensed drivers of the State of Michigan and who regularly travel throughout the State in their automobiles.

of their constitutional rights as guaranteed under both Michigan Constitution 1963, article 1, § 11 and United States Constitution, Am IV. (Id., Counts I and II). Second, plaintiffs contend that the State Police have no authority under state law to implement a plan establishing sobriety checkpoints, and further that the State Police in promulgating the guidelines for the plan have not complied with the provisions of the Michigan Administrative Procedure Act (MAPA), MCLA 24.20 et seq, with regard to a state agency's rule making authority. (Id., Count II).

The case originally came before the Court on plaintiffs' motion for the issuance of a temporary restraining order. At the hearing held on said motion on May 19, 1986, the defendants agreed not to implement their plan until plaintiffs' motion for a preliminary injunction could be heard and resolved by the Court. A hearing on this latter motion was scheduled for May 29, 1986. At that time the parties commenced to put into evidence, proofs relative not only to the issuance of a preliminary injunction, but also to the ultimate merits of the issues of the case. Inasmuch as both parties were prepared to go to trial on the merits of the case, the parties stipulated that the proceedings commencing on May 29, 1986 before the Court would indeed constitute the trial on the ultimate merits of the case. The defendants also agreed to further delay implementing their plan until this Court reached its decision.[2] Thus, the Court need

---

[2]At this point, the Court expressly commends the spirit of cooperation shown by the parties in this action. The highly professional manner that counsel for both sides represented their parties' interests enabled the Court to reach a timely decision on the merits of the case.

not rule on whether a preliminary injunction should have issued, but rather may now reach the merits of plaintiffs' request for declaratory judgment and the issuance of a permanent injunction.

B. Declaratory Judgment Is Appropriate In The Case At Bar.

Under MCR 2.605(A)(1) the Court is empowered to entertain an action for declaratory judgment in the following situation:

> "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

The purpose and requirements of this rule were noted in Shavers v Attorney General, 402 Mich 554, 588-589 (1978):

> The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people. 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed). Committee Comment, p 583; Comm'r of Revenue v Grand Trunk W R Co., 326 Mich 371, 375; 40 NW2d 188 (1949).

> The existence of an "actual controversy" is a condition precedent to invocation of declaratory relief. In general, "actual controversy" exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights. Updegraff v Attorney General, 298 Mich 48, 52; 298 NW 400 (1941); Flint v Consumers Power Co, 290 Mich 305, 309-310; 287 NW 475 (1939); see also, Welfare Employees Union v Civil Service Comm, 28 Mich App 343, 350-351; 184 NW2d 247 (1970).
>
> This requirement of an "actual controversy" prevents a court from deciding hypothetical issues. However, a court is not precluded from reaching issues before actual injuries or losses have occurred. Merkel v Long, 368 Mich 1, 11-14; 117 NW2d 130 (1962). Also, before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads facts entitling him to the judgment he seeks and proves each fact alleged, i.e., a plaintiff must allege and prove an actual justiciable controversy. See Kuhn v East Detroit, 50 Mich App 502; 213 NW2d 599 (1973).
>
> Therefore, what is essential to an "actual controversy" under the declaratory judgment rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised. (emphasis in original).

In the case at bar, it was uncontested that plaintiffs are all licensed

drivers who regularly travel throughout the State and thereby utilize the roads. At trial, it was established that under the plan, sobriety checkpoints could be located in any county of the State. It is obvious therefore, that were defendants' plan implemented, plaintiffs' ability to use the roads of this State would be affected, and their persons subjected to alleged unconstitutional seizures. In this sense, therefore, plaintiffs have presented an actual controversy which may be properly addressed by way of a declaratory judgment action.[3] Given the

---

[3]It is recognized that unlike the overwhelming majority of cases to consider the constitutional validity of sobriety checkpoints, this case does not involve claimants who are suspected of criminal activity. Yet this fact is of little moment since the constitutional guarantees against unreasonable searches and seizures obtain at all times, not just when the police suspect a person of criminal conduct. McDonnell v Hunter, 612 F Supp 1122, 1127 (DC Iowa, 1985).

importance of the issues presented in plaintiffs' action, and that there is an actual controversy stated therein, the Court will exercise its discretion and proceed to decide the merits of the declaratory judgment action.[4]

II. STATE LAW CLAIMS

While plaintiffs assert that the implementation of the defendants' plan would violate their constitutional rights, it is also contended that the plan is invalid under

---

[4]The Court would note in support of its conclusion, that the constitutional issues presented herein have been adjudicated by way of a declaratory judgment action in at least one other case. See Ingersoll v Palmer, 175 Cal App 3rd 1028; 221 Cal Rptr 659 (1985). The Court would further note that at no time during these proceedings did defendants challenge the appropriateness of a declaratory judgment action in this case or the standing of the plaintiffs to bring the action.

state statutory law. The Court addresses these nonconstitutional issues first under the well established principle that courts do not reach constitutional questions if the case might fairly be disposed of on other grounds. Port Huron & D R Co v Dept. of Treasury, 106 Mich App 413, 421 (1981).

A. Defendants' Guidelines Do Not Violate the MAPA.

Plaintiffs contend that the plan to establish sobriety checkpoints, as stated in the Sobriety checkpoint Guidelines (Plaintiffs' Ex. 1), is a rule, as the term is defined in the MAPA, and that the defendants violated the provisions of the MAPA in promulgating the Guidelines.

What is and what is not a rule under the MAPA is set forth in section 7 of the MAPA, MCLA 24.207, which states in relevant part:

"Rule" means an agency regulation, statement, standard, policy, ruling or instruction of general applicability, which implements or applies law enforced or administered by the agency, or which prescribes the organization, procedure or practice of the agency, including the amendment, suspension or rescission thereof, but does not include the following:

(b) A form, with instructions, an interpretive statement, a guideline, an informational pamphlet or other material which in itself does not have the force and effect of law but is merely explanatory.

Under section 41 of the MAPA, MCLA 24.241, before an agency adopts a rule, an agency must undertake to give public notice of and hold public hearings on the proposed rule and transmit copies of the notice to certain specified agencies and persons. Section 43(1) of the MAPA, MCLA 24.243(1), provides, inter alia, that rules not promulgated in accordance with section 41 are not valid.

In the instant case it was established at trial that the defendants did

not comply with the public hearing requirements of section 41, supra. Thus, unless some exception to what is deemed a rule under section 7, supra, applies, the Court would be constrained to conclude that the plan as formulated in the Guidelines is invalid.

In response, defendants assert that the plan is not a rule, but rather falls within any one of the exceptions found in subsection g, h, or j of section 7, supra.

While the Court expresses no opinion as to whether the Guidelines fall within subsection g or j, the court does find that the Guidelines are a type of interpretive statement or guideline which in itself does not have the force and effect of law; rather it is merely explanatory, and thus falls within the ambit of the exception in subsection (h) of section 7, supra.

The substance of the plan is

reflected in the Guidelines. As stated in the Guidelines, p 1, the purpose of the Guidelines are, inter alia,

> B. To provide policy and procedural guidelines by which a pilot program for sobriety checkpoints is to operate in Michigan.
>
> C. To provide checklists of recommended equipment for conducting sobriety checkpoints.

It is apparent from this statement, as well as the stated testimony, that the purpose of the guidelines was to advise members of the State Police as to the proper method of conducting sobriety checkpoints. Thus, the guidelines are akin to other manuals regularly handed out to police by their departments on how to conduct certain sorts of police operations. The Court is unaware of any authority, nor has plaintiffs cited any, which suggests that internally distributed police operational manuals

constitute rules as the term is used in the MAPA. The Court, therefore, concludes that the guidelines fall within the exception to what constitutes a rule under subsection h of section 7, supra.

B. Defendants are Superficially Authorized under State Law to conduct Sobriety Checkpoints.

Plaintiffs also contend that defendants have no authority under state law to implement sobriety checklanes. In response, defendants rely on the provisions of MCLA 257.715(2).

MCLA 257.715(2) provides:

> (b) The director of the department of state police shall cause inspection to be made of motor vehicles operating on the public highways to detect defective equipment or other violations of law governing the use of public highways by motor vehicles, operators and chauffeurs. For such purpose he may establish temporary vehicle check lanes at appropriate locations throughout the state for checking such inadequacies and violations. A county, city, village or township police department may also operate such a temporary check lane within its limits with the express authorization of the director and under the direct supervision of a designated representative of the director. (Emphasis added)

Subsection b of MCLA 257.715 was added to the statute by way of amendment enacted in 1966 PA 214. Prior to this amendment the statute only authorized police officers to stop vehicles for safety inspections upon "reasonable grounds." MCLA 257.715 prior to amendment had been construed to be directed at the control of the operation of unsafe vehicles. People v Lee, 371 Mich 563 (1963). However, the amendment specifically provides for an expansion of the purpose for which the police may stop and check vehicles since the unambiguous language of subsection b refers not only to equipment violation, but to "other violations of law governing the use of public highways by . . . operators."

Significantly, as pointed out by defendants, when subsection 2 was in the legislature, motions were made to delete this language, but were defeated. The Court therefore finds that the purpose of subsection 2 is not merely limited to the enforcement of the laws regarding motor vehicle equipment, but also other laws pertaining to "the use of public highways by . . . operators." This being so, it must follow that MCLA 257.265(2) can be used by the police to enforce the drunk driving laws, since, literally, the statute prohibiting driving while intoxicated, is a law governing the use of the public highways by operators.[5] There, thus appears to be statutory authority for the establishment of sobriety checkpoints.

However, notwithstanding this apparent statutory authorization, plaintiffs,

---

[5]Most courts that have considered the question have held that statutes which provide for the establishment of roadblocks for

nonetheless, challenge the constitutionality of the establishment of sobriety checkpoints as contemplated in the Guidelines.[6] Because

---

the more limited purpose of checking for equipment violations cannot be used as authority to establish sobriety checkpoints. Webb v State, 695 SW2d 676, 677 (Tex App 1985); State v Smith, 674 P2d 562 (Okla Crim App 1984); State ex rel Ekstrom v Justice Court of the State of Arizona, 136 Ariz 1, 663 P2d 992, 996 (1983); also see, State v Cloukey, ___ Me 486 A2d 143, 146-147 (1985); contra, People v Bartley, 109, 111 2d 273, 93 111 Dec 347, 486 NE2d 880, 889 (1985). Because of this Court's conclusion that MCLA 257.265(b) could be read as authorizing sobriety checkpoints, the Court need not decide whether a more limited statute could be used.

In another case, the absence of express statutory authorization was not deemed fatal since the Court found that the requisite authority was implied in law enforcement officers' statutory authority to enforce criminal laws. Ingersoll v Palmer, supra, 221 Cal Rptr at 665. Again, due the Court's conclusion, the Court need not determine whether the State Police, as claimed by the testimony of Col. Hough, indeed would have implied authority to set up sobriety checkpoints.

[6]Indeed, should plaintiffs' constitutional arguments prove persuasive, this would perforce preclude construing the statute to authorize an unconstitutional practice.

plaintiffs' claims as to statutory law have proved to be without merit, it is to the constitutional claims that the Court now turns.

III. CONSTITUTIONAL CLAIMS

A. Preliminary Findings of Fact

Before delving into the intricacies of the arguments concerning the plan's constitutionality, it is appropriate to outline what the plan, as provided for under the Guidelines, and/or described by the various witnesses for the defendants, generally provides for and how it came to be established. In this regard, the Court makes the following findings of fact.[7,8]

---

[7]Other findings of fact will be made in the body of the discussion relative to specific issues pertinent to the constitutionality of the plan.

[8][The original text did not contain a footnote 8].

In 1984, in response to the annual carnage caused by drunk drivers on our state's roads, Governor Blanchard established the Drunk Driving Task Force to provide him and the legislature with proposals to curb drunk driving. The Task Force issued 35 recommendations. One of these was the establishment of sobriety checkpoints. In brief, these checkpoints would be established along state trunklines pursuant to specific guidelines. All motorists would be stopped when reaching a checkpoint and would be examined for signs of intoxication. The stops would be made regardless of whether the police had any articulable suspicion that the particular driver was intoxicated or otherwise engaged in wrongful activity. The stops would be made without warrants.

According to the testimony of Col. Hough, who was a member of the Task Force,

the purpose of the checkpoints would be primarily to deter, and only secondarily, to apprehend drunk drivers. The recommendation was made on the basis of studies made in other states where such checkpoints have been established. The study especially relied on was that done on the pilot program conducted in Maryland. And, indeed, the plan ultimately adopted by defendants was largely modeled on the Maryland plan. From these studies and from conversatons held with other states' law enforcement personnel, he, and other members of the State Police, concluded that such checkpoints could be a good technique to deter drunk drivers. He admitted that at the time, however, he did not have, nor does he presently have, any empirical evidence to support this conclusion. In contrast, he was aware, statistically, that other states were achieving only low rates of

drunk driving arrests by the use of this technique.

After these recommendations were set forth in 1984, Col. Hough, due to legislative opposition, did not attempt to implement sobriety checkpoints. He did so in 1986 on the directive issued by Governor Blanchard in his State of the State Address made in January, 1986.

Pursuant to the Governor's directive, the aforementioned Guidelines were drafted in February and March of this year in order that a test program might be set up. One sobriety checkpoint was actually conducted in May, 1986 in Saginaw County. Thereafter, this lawsuit was commenced.

B. The Plan is Violative of the Fourth Amendment.

While plaintiffs challenge the validity of the plan under both Mich Const, 1963,

art 1, § 11, and US Const, Am IV, the Court will first review the plan's constitutionality under the Federal Constitution. In order to do so, however, it is first necessary to determine the appropriate test used in adjudging plaintiffs' Fourth Amendment claims within the factual context of this case.

1. The Appropriate Test Under the Fourth Amendment.

Initially, it should be noted that the Michigan Supreme Court has expressly declined to pass upon the constitutionality of systematic roadblock stops. People v Whalen, 390 Mich 672, 683 (1973). Thus, there is no Michigan precedent which addresses the Fourth Amendment issue, as presented by the instant case. Yet, this Court does not write on a totally clean slate. Rather, the Court is aware of a substantial

body of existing appellate authority from other States which have passed upon the issue. To date, there are approximately 28 state appellate decisions addressing the issue and which, at least within their own respective jurisdictions, remain extant. In reviewing the substance of these decisions, the Court is initially struck not only by the divergent results reached, but also by the dissimilarity of the methods of analysis used to reach those results.

Some of the cases holding sobriety checkpoints constitutional do so in whole or in significant part merely on the dicta in Delaware v Prouse, 440 US 648, 663; 99 S Ct 1391, 59 L Ed 660 (1979), which indicates that at least for some purposes, stationary roadblock checkpoints could be constitutionally permissible. Kinslow v Commonwealth, 660 SW2d 677, 678 (Ky App, 1983), State v

Goines, 16 Ohio App 3rd 168; 473 NE2d 1219, 1222 (1984).

Others rely on a balancing test which weighs the governmental interest of curbing drunk driving against the amount of "intrusion" caused by the checkpoints, and that the balance is struck in favor of upholding the constitutionality of the check-point where the State can show that the on-the-scene officers' discretion regarding who to stop, or the location of the checkpoint, is limited by guidelines. State v Garcia, ___ Ind App ___; 481 NE2d 148 (1985); Lowe v Commonwealth, _____ VA _____; 337 SE2d 273 (1986); Commonwealth v Trumble, 396 Mass 81; 483 NE2d 1102 (1985); State v Golden, 171 Ga App 27, 318 SE2d 693 (1984). Also see, State v Goines, supra. In these cases the need for, and/or the effectiveness of, sobriety checkpoints does not appear to be a signifi-

cant factor. For example, in Garcia, supra, 153, the Court expressly rejected the necessity to show effectiveness. Also see, Trumble, supra, 383 NE2d at 1105 (no need to show lack of alternative means).

By way of contrast, other cases using the above noted balancing test, hold sobriety checkpoints to be unconstitutional where it is shown that police set up a sobriety check-point without guidelines. State v Crom, 222 Neb 273; 383 NW2d 461 (1986); State v Jones, 483 So2d 433 (Fla, 1986); State v Kirk, 202 NJ Super 28; 493 A2d 1271 (1985); State v Marchand, 104 Wash 2d 434; 706 P2d 255 (1985); Commonwealth v McGeorghehan, 389 Mass 137; 449 NE2d 349 (1983); State v Hillesheim, 291 NW2d 314 (Iowa, 1980); State v Olgaard, 248 NW2d 392 (SD, 1976). These cases read together give the distinct impression that had the police

drawn up sufficiently precise guidelines, the Courts would have upheld the constitutionality of the checkpoints. Again, no significant discussion appears in these cases regarding the need for and/or effectiveness of sobriety checkpoints as a law enforcement technique.

Another line of cases uphold or reject the constitutionality of the sobriety roadblocks, using a balancing test in which the Court weighs the thirteen enumerated factors set forth by the Court in State v Deskins, 234 Kan 529; 673 P2d 1174, 1185 (1983). See, State v Jones, supra; State v Martin, ___ Vt ___; 496 A2d 442 (1985). In this approach, not all the factors need be present in order for the sobriety checkpoint in question to be considered constitutional. Deskins, supra, 673 P2d at 1185.

Many other courts use a three part

balancing test which compares the state interests, the effectiveness and/or need for sobriety checkpoints, and the intrusion which they entail. (This latter factor focuses also upon the degree of discretion left to the on-the-scene officers). Those cases finding sobriety checkpoints constitutional using this three pronged balancing test are Ingersoll v Palmer, 175 Cal App 3rd 1028; 221 Cal Rptr 659 (1985); People v Bartley, 109 Ill 2d 273; 93 Ill Dec 347; 486 NE2d 880 (1985); People v Scott, 63 NY2d 518; 473 NE2d 1 (1984); State v Superior Court, 143 Ariz 215; 691 P2d 1073 (1984); Little v State, 300 MD 485; 479 A2d 903 (1984); State v Coccomo, 177 NJ Supe 575; 427 A2d 131 (1980). Also see, State ex rel Ekstrom v Justice Court, 136 Ariz 1, 663 P2d 992 (1983) (Feldman, Jr., conc). The following cases, however, using the three part balancing test, find sobriety

checkpoints unconstitutional. State v Muzik, ___ Minn App ___; 379 NW2d 599 (1985); Webb v Texas, 695 SW2d 676 (Tex App, 1985; State v McLaughlin, ___ Inf Spp ___; 471 NE2d 1125 (1984); State v Smith, 674 P2d 562 (Okla Crim App. (1984); State ex rel Ekstrom v Justice Court, 136 Ariz 1, 66 P2d 992 (1983). Also see, State v Crom, supra, 383 NW3d at 463-470 (Krivosha, C.J., conc); State v Koppel, ___ NH ___, 499 A2d 977 (1985) (use of balancing test under state constitution).

Thus, with perhaps the exception of those courts which would find sobriety checkpoints constitutional solely on an uncritical reliance on the dicta in Prouse, supra, courts which rule on the matter under the Fourth Amendment do so on the basis of some form of a balancing test; that is, weighing one's individual rights against society's safety and society's interest in law

enforcement. The courts which do use a balancing test, do so on their construction of prior United States Supreme Court decisions. Therefore, to determine the appropriate balancing test, this Court looks primarily to United States Supreme Court precedent construing the Fourth Amendment.

US Const Amend IV states in relevant part:

> "The right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated."

With respect to seizures of persons while in their automobiles, it has been indicated that persons are inclined to expect less privacy in an automobile than they would in their homes and therefore, are not required to be given the same kinds of protection that the Fourth Amendment affords to persons in their homes. Chambers v Maroney,

399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970), reh'g den, 400 US 856; 91 S Ct 23; 27 L Ed 2d 94 (1970). Yet, the mere fact that an automobile is involved does not eliminate the guarantees provided by the Fourth Amendment. United States v Ross, 456 US 798; 102 S Ct 2157; 72 L Ed 2d 572 (1982); Delaware v Prouse, 440 US 648, 662-663; 99 S Ct 1391; 59 L Ed 2d 660 (1979); also see, Carroll v United States, 267 US 132, 153-154; S Ct 280; 69 L Ed 543 (1925). Thus, the stopping of an automobile and the detaining of its occupants constitutes a seizure within the meaning of the Fourth Amendment. Delaware v Prouse, supra, 440 US at 653.

Ordinarily, in order to satisfy the constitutional guarantee against unreasonable seizures, in the absence of a warrant, and absent other exceptions to the warrant requirement not applicable herein, the police

are required to have an individualized and articulable suspicion of wrongdoing before stopping an automobile for investigatory purposes. Delaware v Prouse, supra, 440 US at 662; United States v Brignoni-Ponce, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975). Yet, it has been recognized that "the Fourth Amendment imposes no irreducible requirement of such suspicion." United States v Martinez-Fuerte, 428 US 543, 561; 96 S Ct 3074; 49 L Ed 2d 1116 (1976). Rather, the reasonableness, and thus the constitutionality, of seizures that are less intrusive than a traditional arrest, such as are at issue in the instant case, depend, as summarized in Brown v Texas, 443 US 47; 50-51; 99 S Ct 2637; 61 L Ed 2d 327 (1979):

> "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."
>
> Consideration of the constitutionality of such seizures involves a weighing of the

> gravity of the public concerns served by the seizure advances the public interest, and the severity of the interference with individual liberty. (authorities omitted)

In formulating this test,the Court in Brown principally noted three of its prior decisions. United States v Brignoni-Ponce, supra; United States v Martinez-Fuerte; and Delaware v Prouse, supra. These cases merit some attention, since all three involved the question of under what circumstances the police could stop a motorist for investigatory purposes without having an articulable individualized suspicion of wrongdoing. These cases, therefore, shed some light on how the balancing test enuciated in Brown, is to be applied.

In Brignoni-Ponce, the United States Border Patrol, operating near the Mexican-American border while on roving patrol, stopped an automobile to investigate whether

the car was carrying illegal aliens. The Border Patrol had no suspicion that the vehicle stopped was being used to transport illegal aliens. The Court held the stop and attendent seizure of the automobile's occupants to be violative of the Fourth Amendment. The Court initially noted the enormity of the problem of the entry of illegal aliens into the country, and held that the government had shown not only a keen public interest in the problem, but also that roving patrols advanced this interest in that "They succeed in apprehending some illegal entrants . . . and they deter the movement of others by threatening apprehension . . ." Id., 422 US at 879. Against these two factors the Court weighed the interference with individual liberty based on the fact that the stop typically lasted less than a minute and the inspection was limited to those parts of

the vehicle which could be readily seen. Only one or two brief questions were asked of drivers concerning their citizenship.

Balancing these factors, the Court found that the Border Patrol did not need probable cause to stop the car, but that a reasonable suspicion would suffice. The Court, however, refused to dispense with the requirement of reasonable suspicion, because of the unlimited discretion given the Border Patrol. Id., 422 US at 882-883.

In United States v Martinez-Fuerte, the Court upheld the constitutionality of permanent checkpoints established by the Border Patrol near the Mexican-American border on major highways which stopped and checked all vehicles entering the country for the purpose of investigating whether the vehicle was carrying illegal aliens. Once again the Court noted the enormity of the

problems in controlling the flow of illegal aliens into the country along the Mexican-American border. A valid public concern was therefore found. The Court also noted that in fiscal 1973, traffic checking operations had apprehended approximately 55,300 deportable aliens or approximately 25% of the total deportable aliens siezed in that year throughout the country. Most of these checking operations were done at permanent border checkpoints. Id., 428 US at 553. The Court concluded that the government had shown the "substantiality of the public interest in the practice of routine stops for inquiring at permanent checkpoints." Id., 428 US at 556. On the other hand, the Court found that the alternative of requiring stops on major inland routes always be based on reasonable suspicion, to be impractical, because of the heavy flow of traffic, and because such a

requirement "would largely eliminate any deterrent to the conduct of well-disguised smuggling operations." Id., 428 US at 557. In so finding, the court noted that the petitioner had failed to "suggest persuasively that the particular law enforcement needs served by the checkpoints, could be met without reliances on routine checkpoint stops." Id., 428 US at 556, Fn 12.

With respect to the intrusiveness of the stop, the Court distinguished between the objective nature of the intrusion into an individual's privacy interest as opposed to the subjective nature of the intrusion. As to the former, the Court found the intrusion minimal, based on the brief period of time that most stops took, and the limited nature of the investigation.

The subjective nature of the intrusion was also held to be minimal. The Court

noted that the checkpoints were permanent and thus, "motorists using these highways are not taken by surprise as they know or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere," Id., 428 US at 559. Secondly, the Court noted that the officers operating the checkpoints had minimal discretion as to whom to stop. Also, the limited discretion of the officers in the field was further circumscribed by the fact that the location of the checkpoints was determined by superior officers. Id., 428 US at 559.

In balancing all of these factors the Court upheld such checkpoints based on the presence of a) the public interest and legitimacy of such stops, b) the need for this particular enforcement technique being demonstrated, and c) the reasonableness of the procedures involved which lessened both

the objective and subjective nature of the intrusion. Id., 428 US at 562.

Lastly, in Delaware v Prouse, supra, the Court held that a police officer's stop of a motorist in order to check the validity of the motorist's license and vehicle registration was unconstitutional where the policeman had no suspicion of wrongdoing. In so holding, the Court first looked to the State's interest, and found that it has "a vital interest in ensuring only those qualified to do so are permitted to operate motor vehicles, and these vehicles are fit for safe operation." Id., 440 US at 658. The Court then examined "whether in the service of these important ends, the discretionary spot check is a sufficiently productive mechanism." Id., 440 US at 559.

In this latter inquiry, the Court first noted that spotchecks did not appear to

be "sufficiently productive" in terms of actually apprehending unlicensed drivers or deterring them from driving. The Court reasoned that unlicensed, and hence unsafe drivers, were more likely to be found among those who committed traffic violations. Thus, the police would be more likely to apprehend unlicensed drivers, not by randomly searching from among the population of all drivers, the vast majority of whom were presumed licensed to drive, but rather among those who drive unsafely or committed traffic violations. 440 US at 659-661. The Court also found thereby, that the police had available to it alternative means which were based on the constitutionally approved standard of reasonable suspicion for stopping and checking a motorist's license and registration. This further indicated that there was no need for this police procedure. Id.

Finally, the Court noted that because of the lack of standards, the police in making spot-checks had unfettered discretion as to when stops would be made and as to who would be stopped. Accordingly, there was deemed to be a substantial intrusion to a person's privacy interests. Id., 440 US at 661-663.

The balancing of these factors by the court, led it to hold that the police were required to have a reasonable suspicion of wrongdoing before stopping and seizing an individual motorist to check his or her driver's license and the registration of the automobile. Thus, the seizure of the motorist in the case before it was held violative of the Fourth Amendment. Id., 440 US at 663.

However, the Court did not stop at this point, but went on to state the following dicta:

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. (text of footnote omitted).

In applying the foregoing to establish a test to adjudge whether sobriety checkpoints are valid under the Fourth Amendment, the Court notes that the dicta in Prouse is not controlling.

First, the Court notes that the dicta in Prouse was stated without the Court fully delineating the factors which had caused it to sustain or strike down analogous police practice.

Moreover, in light of the holding reached in Prouse, its dicta appears confusing. This point is made clear by the Washington Supreme Court in State v Marchand, supra, 706 P2d:

> From Prouse, therefore, we have a clear holding that this type of stop is invalid particularly because the efficiency of the "spot check" stop is not proven in the record. But, added to that we have confusing dicta that asks us to believe that the stopping of all traffic is somehow less intrusive to a particular motorist than the stopping of that motorist alone. The logic of this belief escapes us.

Also see, State v Crom, supra, 383 NW2d at 468 (Krivosha, C.J., conc.).

Finally, the dicta in Prouse, to the extent that it may be taken as authorization for checkpoints to check for a valid driver's license and registration, is inapplicable to a case involving a sobriety checkpoint, due to the ability of police to more readily identify drunk drivers as opposed to those driving without a valid license or vehicle registration. This point is explained by the Court in State v Cloukey, 486 A2d 143, 147 (Me. 1985). In Cloukey, supra, 146-147, the Court while upholding the constitutionality

of a license/registration checkpoint, distinguished the case before it from that involving a sobriety checkpoint:

> This case does not involve a sobriety stop. There may be many effective ways of detecting a drunken driver without intruding on the rights of the citizen. A trained eye can readily spot erratic operation. The unlicensed driver, however, displays no observable characteristics. If a license check under any circumstances is unreasonable, then in most instances, public protection must await the commission of another offense.

Because the Court does not find the dicta in Prouse controlling, the Court would further find that reliance on cases such as Kinslow, supra, and Goines, is misplaced.

The Court is thus left to apply a balancing test. A review of the test developed in Briqoni-Ponce, Martinez-Fuerte, and Prouse, and synthesized in Brown, all lead the Court to conclude that a balancing test which only looks to the validity of the state interest as measured against the presence or

non-presence of an administrative plan to conduct sobriety checkpoints is insufficient. Clearly, the second prong of the test as stated in Brown requires a court to examine the extent to which a sobriety checkpoint furthers the state interest, and as exemplified in Prouse, and Martinez-Fuerte, this inquiry also entails whether there is an alternative procedure which can be more properly used. Accordingly, the Court finds those cases noted above which base their result on merely whether the police have a reasonable plan-not persuasive, at least in terms of what test is to be applied.

This conclusion also renders the thirteen factored approach of Deskins suspect as well. As noted earlier, in using this approach, not all of the factors need be found in order to uphold the constitutionality of a particular checkpoint. An examina-

tion of the substance of these factors shows that the great majority of them pertain to the adequacy of police guidelines. Only two pertain to the effectiveness of the program. Thus, a court employing the Deskins approach could easily come to the conclusion that sobriety checkpoints were constitutionally permissible so long as the state had showed that the factors pertaining to the adequacy of guidelines were present. A court would therefore not have to examine closely how effective a sobriety checkpoint was. Indeed, the sense of the Deskins opinion indicates that this is precisely how the majority reached its result in sustaining the constitutionality of the checkpoint before it. See State v Deskins, supra, 673 P2d at 1187 (Prager, J., diss.). Thus, while the factors listed in Deskins might be of some use in identifying which plans insure that the

intrusion occasioned by the checkpoints is kept to a minimum, -- the factors given in Deskins cannot be seen by themselves to set forth the appropriate constituional test.

In contrast with the noted approaches, many cases adhere to a three part balancing test. The Court finds this test to be in substantial conformity with the three part balancing test stated in Brown. These cases, therefore, appear most relevant to the resolution of the constitutional issue herein. The Court in its decision will therefore follow the lead of these cases and examine the matter through the use of the Brown balancing test.

2. Findings of Fact Relative to the Factors of the Brown test.

A. State Interest

The first factor of the Brown test addressed the gravity of the public concern

which is assertedly served by the seizures in question. See, State v Muzik, supra, 379 NW2d at 602; People v Scott, supra, 473 NE2d at 4. In the instant case it is largely conceded by all that the State has a keen interest in curbing drunk driving. It is true that the testimony presented gave varying figures as to exactly how many persons were killed or maimed as a result of intoxicated drivers.[9] Yet, the dispute over precisely how many persons die or are injured as a result of drunk drivers is largely a dispute over the degree of the problem, not

---

[9]For example, Lt. Downer, of the Michigan State Police, testified that in 1984, there were 1392 fatal motor vehicle accidents in the State. Of these, he estimated that in 704, or more than 50% of these, alcohol was a contributing factor. On the other hand, Dr. Lawrence Ross, a nationally recognized expert in the field of law enforcement problems in curbing drunk driving, estimated the national rate of fatal accidents caused by alcohol to be 25% of all accidents.

whether or not a serious problem does exist. As noted in South Dakota v Neville, 459 US 553; 103 S Ct 916, 74 L Ed 2d 748 (1983): "The carnage by drunk drivers is well documented and needs no detailed recitation here." Also see, People v Bartley, supra, 486 NE2d at 885 (and cases cited therein). As a factual matter, the Court therefore finds that there is a grave and legitimate State interest in curbing drunk driving.

B. Effectiveness

The second element of the Brown test examines the degree to which the seizure advances the public concern involved. See State v Muzik, supra; Ingersoll v Palmer, supra, 221 Cal Rptr at 666. As exemplified in the treatment accorded this issue in Martinez-Fuerte and Prouse, as recounted above, the degree to which particular law

enforcement techniques furthers the particular state concern in question, depends upon not only inquiring into how effective the technique is, but also examining the degree to which it can be said that there are no permissible alternative means available to the police which advance the particular state concern. This factor inquires not only into the effectiveness, but also the need for a particular practice. The Court first examines whether sobriety checkpoints are an effective means of curbing drunk driving.

In the case at bar, the defendants argued throughout, that the effectiveness of sobriety checkpoints should be determined not on the degree to which checkpoints effectuated the arrests of drunk drivers, but rather the extent to which they deter persons from drinking and driving. Thus, defendants, in effect, assert that the Court need not

look too closely at the ability of roadblocks to effectuate the apprehension of drunk drivers. The Court notes that defendants' argument appears to be supported by the treatment of the issue found in Ingersoll v Palmer, supra, 221 Cal Rptr at 666-667; People v Scott, supra, 473 NE2d at 5-6; and State v Superior Court, supra, 1076-1077.

This Court, however, does find that the ability of sobriety checkpoints to generate the arrest of drunk drivers is relevant to our inquiry.

First, as the above discussion of the analysis in Martinez-Fuerte, and Prouse shows, the ability of a particular law enforcement technique to effectuate arrests in furtherance of a public concern was clearly a relevant factor in the Court's discussion. Thus, the treatment of the issue in the United States Supreme Court cases indicates

that this Court should examine the degree to which sobriety checkpoints effectuate arrests.

Second, and perhaps more importantly, based on the evidence adduced at trial, the court finds that the degree to which a particular law enforcement program can be successful in achieving arrests must be seen as directly related to the program's usefulness in deterring a problem.

In this regard, the Court notes that Dr. Ross testified that the extent to which any law enforcement program actually served to deter potential wrongdoers was largely premised on there being a public perception that if a person broke the law he or she would be caught and speedily punished. Thus, a program could be deemed an effective deterrent mechanism if the public perceived that program as being capable of increasing a

wrongdoer's chance of being caught and punished.

Dr. Ross's observations as to what constitutes an effective deterrent program is borne out by the published goal of sobriety checkpoints, as stated by the defendants themselves, in a brochure explaining why sobriety checkpoints were being implemented. The defendant's brochure states in part:

> "Sobriety checkpoints are not a new idea. They have been used as an effective tool in 39 other states. The risk of being detected and apprehended serves as a deterrent to drunk drivers."
> (Defendants' Exhibit 12, emphasis added).

The Court concludes from this evidence that the concept of the deterrent effect of a given program, is linked to the degree to which a program is effective in apprehending wrongdoers. This is so, since if a program was not, in fact, an effective tool in achieving arrests, the public would

soon learn of or come to perceive this, and the "deterrent" effect (i.e., the ability of a program to make the public believe that they will be apprehended and brought to justice by dint of the implementation of the program if they violate the law which the program is designed to further) will naturally decline.[10]

Accordingly, for the foregoing reasons the Court proceeds to examine the degree to which sobriety checkpoints are an effective tool in achieving arrests of drunk drivers.

Dr. Ross testified that on a national average less than 1% of the drivers

---

[10]Again, the Court notes that Dr. Ross opined that the deterrent effect of a law enforcement program would diminish rapidly if the public came to percelve that the program did not achieve what its promoters said it would. Dr. Ross's testimony as to effect was essentially uncontradicted.

who pass through sobriety checkpoints are actually drunk, and thus, the chances of apprehending drunk drivers at sobriety checkpoints were slim. He further stated that he knew of no study which indicated that sobriety checkpoints were resulting in a high yield of arrests or that it was worthwhile as a technique to achieve a high rate of arrests.

Dr. Ross's testimony as to the statistical indications of the effectiveness of sobriety checkpoints in effectuating arrests is corroborated by the testimony of witness, Lt. Cotton of the Maryland State Police. He reported that Maryland had used sobriety checkpoints for the past several years. During this period of time 125 checkpoints had been operated. Approximately 41,000 motorists had passed through them, yet only 143 persons, or less than 1% of those passing

through, were arrested for drunk driving.

Additionally, Col. Hough testified that in the one sobriety checkpoint operation carried out in May of this year in Michigan, of 126 cars that were stopped, two persons were arrested for drunk driving. While the percentage is slightly more than 1 1/2%, the Court finds the results of the Michigan sobriety checkpoint also corroborate, in general, Dr. Ross's testimony that checkpoints would yield an extremely low rate of arrests.

In addition to this evidence, the figures available in the reported appellate decisions of other states, for the most part, further bear out Dr. Ross's initial observations. See State v Justice Court, supra, 663 F2d at 993 (of 5763 motorists stopped, 14 arrested for drunk driving); State v Deskins, supra, 673 P2d at 1187 (between 2,000 and

3,000 persons stopped, 15 arrested for drunk driving); State v McLaughlin, supra, 471 NE2d at 1137 (in one county, 115 cars stopped, 3 persons arrested for drunk driving; in another county, 8 - 10 roadblocks set up, each stopped between 90 - 150 cars, some resulted in no arrests, one resulted in 5 arrests); State v Garcia, supra, 481 NE2d at 154 (100 cars passed through checkpoint, 7 persons arrested for drunk driving); Ingersoll v Palmer, supra, 221 Cal Rptr at 661 (233 motorists stopped, no arrests for drunk drivers); State v Crom, supra, 383 NW2d at 469 (police conduct biweekly roadblocks for 50 weeks; No evidence adduced showing any arrests for drunk driving). While the roadblock under review in Garcia produced a 7% rate of apprehension, in view of the results in other states, the figure appears more as an exception rather than a true indi-

cator as to how effective checkpoints are in effectuating drunk driving arrests. The figures adduced in these other states all indicate an extremely low rate of arrests per motorist stopped, and further serve to corroborate Dr. Ross's initial observations regarding the lack of effectiveness of checkpoints in achieving significant numbers of arrests for drunk driving.

The above evidence leads the Court to conclude that sobriety checkpoints have not been shown to be an effective means for apprehending drunk drivers.

The Court next examines the issue of the deterrent effect of checkpoints in curbing drunk driving. In these proceedings, the evidence adduced relevant to checkpoints' deterrent effect was found in statistical data and on the personal observations and opinions of various witnesses.

With regard to statistical data relevant to the issue of deterrence, the Court would initially note that Col. Hough testified that at the time that he formulated the recommendation to implement checkpoints, as well as presently, he knew of no emperical evidence which showed that sobriety checkpoints had a deterrent effect on drunk driving.

Lt. Cotton of the Maryland State Police, however, testified as to what he believed were the effects in Maryland in having instituted sobriety checkpoints. Sobriety checkpoints were first introduced in Maryland in the latter portion of December, 1982. The statistics given by Lt. Cotton indicated that after 1981, i.e., for the years 1982, 1983, 1984, the rate of fatal alcohol related accidents, of drivers involved in alcohol related accidents who

were found to have a significant level of blood/alcohol ratio, and the rate of multi-car accidents caused in part by alcohol had all fallen. The Court would note, however, that the most significant drop in these years occurred between 1981 and 1982, and that in 1983 and 1984, the rates of the three above-mentioned catagories variously rose and fell. Finally, it was established that beginning in the first part of 1982, Maryland instituted numerous other programs designed to curb drunk driving.

These statistics thus cannot be found to be convincing evidence of deterrence for the following reasons. First, the Court notes that the most significant drop in the numbers referred to above, all occurred in 1982 compared to 1981. Yet, sobriety checkpoints were implemented only in the last weeks of 1982. Given the presence of other

new anti-drunk driver programs being implemented through 1982, it is not reasonable to credit only the implementation of checkpoints with the drop in statistics related to drunk driving problems. Moreover, in the two full years that sobriety checkpoints were implemented, these numbers rose and fell within a few percentage points of the previous year's rate. These statistics thus reveal little, if anything, which tends to confirm such checkpoints' deterrent effect.

Lt. Cotton also based his opinion that sobriety checkpoints did deter drunk driving on the basis of statistics which showed that in the years 1983 through 1985, those counties which implemented checkpoints had an overall decrease in alcohol related accidents. Yet, again, a closer look at the study relied on by Lt. Cotton shows that the results are equivocal, since the study showed

that in many of the counties which had sobriety checkpoints, alcohol related fatalities rose, while in other counties which did not implement checkpoints, alcohol related fatalities dropped. These numbers, thus, do not suggest anything close to unqualified support for concluding that sobriety checkpoints significantly effected the deterrence of drunk driving.

Another collection of statistical data that was referred to, was a report on the results achieved in the pilot study conducted in Maryland as to the effects of sobriety checkpoints. (Significantly, Lt. Cotton, on cross examination pointed to this study as containing the sole <u>empirical</u> evidence concerning checkpoints' efficacy.) This pilot program was conducted between December, 1982 and February, 1983. Two counties with similar demographic characteristics

were selected. Checkpoints would be implemented in one, Harford County. The other county, Frederick County, would not have sobriety checkpoints, and would thus serve as a "control" county. At the conclusion of the pilot program, statistics were compiled which compared the rate of alcohol related accidents and the rate of fatalities in both counties, with these rates of the same period in the year preceeding the pilot program, and also with the three month period immediately preceeding the start of the program. The comparative statistics indicate that comparable rates of decline in the number of alcohol related accidents in both counties occurred when compared with the statistics of the preceeding year. They also showed that

the rate of fatalities[11] actually doubled in Harford County, which had checklanes during the pilot progrm when compared with the preceeding year. At the same time, Frederick County, which did not have sobriety checklanes showed a marked decrease in fatalities.

When compared with the preceeding three month period, the data indicates both counties experienced rates of decline in alcohol related accidents. Additionally, both counties experienced declines in the rate of fatalities when compared to the data concerning the three month period immediately preceeding the test period.

To the extent that the study is

---

[11]While the number of alcohol related fatalities was not revealed, from the estimates given in Lt. Downer's testimony, approximately 50% of these fatalities could be estimated to be alcohol related. Thus, it can be assumed that a large proportion of these fatal accidents were alcohol related.

based on statistically significant data, on one level, the foregoing data appears to support defendants' contention that sobriety checkpoints do serve to deter drunk drivers in that the numbers show a decrease in the rate of alcohol related accidents in the period when the pilot program was being conducted in Harford County when compared to previous time periods. Yet, this simplistic reasoning is unpersuasive.

First, as noted above, during this time period Maryland was implementing several other programs. The similarity in the decreasing rate of alcohol related injuries which occurred in both counties, checklane and non-checklane, is consistent, if anything, with an overall state wide trend.

Moreover, the Court perceives a fundamental flaw in the assumption that implementation of the checkpoints in Harford

County had a positive causal effect on that county's rate of alcohol related accidents. If this assumption is reasonable, it remains unexplained why it is also not reasonable, using this sort of crude cause-effect analysis, to assume that the implementation of checkpoints in Harford County did not also contribute to the <u>increase</u> that Harford County experienced in the rate of traffic fatalities during the time period of the pilot program. Of course, due to other unexplained factors this latter assumption may not be warranted. Yet it does serve to point out the underlying flaw in merely assuming Harford County's decrease in the rate of alcohol related accidents was due largely to the implementation of checkpoints, without some accounting for other extraneous factors.

Thus, the statistical data adduced

in this case relative to the deterrent effect of sobriety checkpoints is simply not of a sufficient persuasive value to support the conclusion that checkpoints have a deterrent effect.[12] Rather, the Court finds that this data essentially does not support the deterrent effect of checkpoints. Other evidence relative to sobriety checkpoints' deterrent effect revolved largely on the personal opinions of various witnesses.

It was Dr. Ross's opinion that such checkpoints did not have any long term, or lasting deterrent effect. That at best, such a program would only have a short term deterrent effect in the particular locale where they were implemented, and that this effect was dependent on extensive media coverage over which the police had no

---

[12]The Court is aware that data cited in People v Scott, supra, 473 NE2d at 5-6, and State v Super Ct, supra, 691 P2d at 1077, which was relied on by these Courts to find a deterrent effect suffers from largely the same infirmities as the data quoted in Lt. Cotton's testimony. In particular, in Scott the Court was able to identify consistent overall decreases in the rate of alcohol related accidents and fatalities in the years subsequent to instituting checkpoints. Yet, the Court also concluded that during these years, the State had implemented numerous other anti-drunk driving programs.

Thus, it was not revealed the extent to which implementing checkpoints caused this decline. While this Court would agree with Scott that the State need not "spell out the exact efficiency coefficient of each component" Id., in this Court's view, in light of the constitutional issue involved, there must be some positive showing of deterrence beyond mere conjecture or assumption. This Court therefore does not find the data compiled in these decisions to be of any persuasive effect.

control. That at worst, such a program could have a counter productive effect in nearby area, since due to the extensive manpower needed to maintain checkpoints, persons wishing to drink and drive or who wished to commit other crimes would feel safe to do so, since significant law enforcement resources

were being directed elsewhere.

Dr. Ross's opinion was corroborated by the testimony of the Sheriffs of Wayne, Macomb and Kalamazoo Counties. It was their consistent professional opinion, based on what they knew of checkpoints, that they did not believe checkpoints to be an effective deterrent.

In contrast, both Col. Hough and Lt. Cotton stated their belief in the deterrent effect of sobriety checkpoints. Apart from statistical data, they based their opinion on what they perceived public opinion to be, and on anecdotal evidence.

In assessing the weight to be given this testimony, the Court notes that of the above witnesses who gave professional opinions, Dr. Ross and the County Sheriffs had no interest in the outcome of the litigation.

Finally, in adjudging the deterrent

effect of sobriety checkpoints, the Court returns to its earlier observations concerning the relevancy of the rate of arrests made in checkpoints. As found above, sobriety checkpoints cannot be expected to achieve any significant level of apprehending drunk drivers. This finding, in the Court's opinion, essentially undermines the whole theoretical basis for concluding that checkpoints can be effective in deterring drunk drivers, (i.e., that the public would fear being arrested for drunk driving if sobriety checkpoints were implemented, and thus, would not engage in drunk driving). Once the public perceives the truth about the low chance of a drunk driver actually being apprehended in a sobriety checkpoint, it cannot be reasonably supposed that those who are inclined to drink and drive will perceive a sobriety checkpoint as a significant threat

to their being arrested.

The Court, in determining whether sobriety checkpoints advance the public concern of curbing drunk driving, lastly examines the extent to which there is no practical alternative means available to the State to advance its interest other than by implementing sobriety checkpoints.

At trial, defendants sought to show this primarily through the introduction of data in the testimony of Lt. Downer, which indicated that while from 1958 to 1984, non alcohol related accidents had fallen from 2.8 per 100,000,000 miles of road traveled to 1.9; alcohol related accidents remained at approximately 1.1 per 100,000,000 miles of road traveled. Lt. Downer also noted that during this time period, however, the amount of drunk driving arrests had risen from approximately 17,000 statewide in 1968, to

over 71,000 in 1984. Defendants argued on the basis of this data that conventional methods of curbing drunk driving have not had a significant impact on the problem.

This Court does not find this argument persuasive. Even if there were no other evidence regarding the availability of alternative means of curbing drunk driving; the Court would note that this data does not suggest that sobriety checkpoints would be any more effective in reducing drunk driving. Such checkpoints were shown at best to have only a short term impact, and accordingly, this data does not demonstrate that checkpoints are the only practical alternative.[13]

---

[13]Moreover, unexplained by Lt. Downer or defendants, is the possible impact on these figures that such things as an increase in the number of drivers, temporary lowering of the age for drinking, or increased number of law enforcement personnel all might have had in producing these statistics. These figures therefore, are not conclusive.

To the contrary, other evidence adduced at trial did convincingly demonstrate that conventional law enforcement methods, when utilized in conjunction with campaigns to increase the public awareness of the problem of drunk driving, were shown to be effective methods of curbing drunk driving.

As noted earlier, the data from the pilot study done in Maryland indicates that a county using only conventional law enforcement techniques was able to achieve reductions in drunk driving accidents at a rate similar or better than a county which implemented checkpoints. Moreover, Lt. Cotton noted that Baltimore County, one of Maryland's largest counties, had never had checkpoints. Yet, that county had consistently shown a drop in alcohol related accidents. The programs implemented by its sheriff were credited with this reduction.

Baltimore County, without the use of sobriety checkpoints, had furthermore won national awards for the results achieved by its law enforcement personnel in curbing drunk driving. The evidence from Maryland shows very strongly that effective alternative means of reducing the rate of drunk driving accidents do exist.

The Court further notes that Col. Hough testified as to certain special programs that the State Police had implemented, and that these programs had resulted in reducing alcohol related accidents. At the very least, his testimony indicates that the statistics given by Lt. Downer do not tell the whole story, and that other programs had, in fact, resulted in reducing drunk driving accidents or fatalities in Michigan.

Col. Hough's testimony was corroborated by the testimony of the Sheriffs of

Wayne, Macomb, and Kalamazoo Counties, all of whom testified that the intensive use of certain conventional law enforcement techniques had a positive effect in their counties.

The testimony of Col. Hough and the Sheriffs as to the existence of other alternative programs was corroborated by that of Dr. Ross. In his opinion the State had other options to sobriety checkpoints, such as administrative license revocation and stepped up prosecution and punishment of those arrested and convicted for drunk driving.

Dr. Ross's testimony as to the existence of other devices for curbing drunk driving, which may not have been implemented, is additionally borne out by the fact that of the 35 specific recommendations made by the Drunk Driving Task Force in 1984, Col. Hough testified that the only one which the State had attempted to implement was the one

regarding sobriety checkpoints. The Court is left to wonder why none of the other 34 recommendations were deemed worthy of implementation.

Based on the foregoing, the Court finds the data given by Lt. Downer as to the unavailability of alternative means unpersuasive. The evidence taken as whole, rather, indicates that while drunk driving remains a grave problem, other programs which rely on approved methods of law enforcement can, and do, in fact, have a positive effect in reducing drunk driving accidents and fatalities.[14]

In summary of the foregoing, the

---

[14]The Court's conclusion is supported by the finding of alternative means in State v McLaughlin, supra, 471 NE2d at 1137; Webb v State, supra, 695 SW2d at 682. Also see, State v Deskins, supra, 673 P2d at 1187 (Prager, J., diss.).

Court finds that sobriety checkpoints are not an effective means to apprehend drunk drivers, that such checkpoints do not have any long term deterrent effect, and that there exists alternative means available to the defendants in their effort to curb drunk driving. Accordingly, the Court further finds that sobriety checkpoints, of the type which defendants' plan seeks to implement, do not significantly further the public interest in curbing drunk driving.

C. Intrusiveness of Sobriety checkpoints

The last factor to be examined under the Brown test is the severity of the intrusion on individual liberty which results from the seizure of persons in sobriety checkpoints. See, State v Muzik, supra, 379 NW2d at 603; Ingersoll v Palmer, supra, 221 Cal Rptr at 667. Under this factor, as

exemplified by the analysis found in Brignoni-Ponce; Martinez-Fuerte, and Prouse, the Court examines both the objective and subjective nature of the intrusion on individual liberty interests.

In the Martinez-Fuerte and Prouse cases, the objective nature of intrusion is measured, in general, by examining such factors as the duration of the seizure and the intensity of the police investigation which occurs during the seizure.

In measuring the objective quality of the instrusion in the case at bar, the Court notes that it was the consistent testimony of those police officers who had actually had some experience in operating checkpoints, that the average length of a stop when a person was confronted by a police officer at a checkpoint was approximately 30 seconds. Moreover, the Court notes that the

Guidelines indicate that the intensity of the investigation by the police during this 30 second time period was not great, inasmuch as the police were directed only to observe the driver for signs of intoxication.

The Court concludes from this evidence that the objective nature of the intrusion was minimal.

The Court next passes on to consider the subjective nature of the intrusion on individual liberty interests. In examining the subjective quality of the intrusion, under the analysis of Martinez-Fuerte, the Court is directed to make its findings on the basis of two factors: the degree of surprise and fright which could be engendered by the seizure; and the amount of discretion that an on-the-scene officer has in determining the location of the checkpoint and in determing whom shall be stopped. A final factor in

analyzing the subjective nature of the intrusion, as suggested in Prouse, and in Brown, is the extent to which checkpoints are consistent with traditionally protected liberty and privacy interests. Also see, State v Smith, supra, 674 P2d at 564-565; Webb v State, supra, 695 SW2d at 683.

Regarding the degree of surprise and fright which could be engendered by the seizure at the checkpoint, it is important to note that in Martinez-Fuerte the Court found the checkpoint under review did not generate surprise or fear, largely on the basis that the checkpoint in question, was a permanent one. The Court reasoned that because of the permanency of location, people would know or could learn of the checkpoint's location. Thus, there would be no surprise or fear in encountering the checkpoint, because people knew it would be at a given location. This,

of course, also meant the persons not wanting to go through the checkpoint could take alternate routes.

In subsequent cases upholding the constitutionality of temporary checkpoints, courts have found that such checkpoints do not create surprise or fear, notwithstanding their temporal nature, when the police give advance warning through the media of the general location of such checkpoints. The public is thereby alerted to the presence of such checkpoints in the vicinity and are less likely to be surprised or fearful in encountering such checkpoints. Ingersoll v Palmer, supra, 221 Cal Rptr at 669-670; People v Bartley, supra, 486 NE2d at 888; State v Superior Court, supra, 691 P2d at 1077; Little v State, supra, 479 A2d at 913. Additionally, when the public is accorded an opportunity to make U-turns or turn offs, and

thus avoid altogether the necessity of going through the checkpoint, this is seen as a further indicia that the checkpoint will not generate fear or surprise. Little v State, supra.

Another factor in determining the degree of surprise and fear that a particular checkpoint will induce is the purpose for which the police are stopping vehicles. In this regard, it may be presumed that a checkpoint instituted to enforce administrative requirements, would generate less fear then if the checkpoint was instituted to search for violators of criminal laws. State v Smith, supra, 674 P2d at 565.

In applying the foregoing to the case at bar, the Court notes the following relevant facts: The sobriety checkpoints, as conceded by all, will be transitory.

The Guidelines suggest that advance

warning to the general public be given by the police as to the county in which the checkpoints will be located. As indicated by Col. Hough this will be accomplished by giving press releases to the local news media. The Court notes, however, that the defendants have not indicated that the news media are required to publish this notice or to give the checkpoint any special attention. The Guidelines do not provide for alternative methods for alerting the public as to the location of checkpoints should the media refuse to cooperate or give only minimal attention to the news releases of defendants.

In a further effort to alert motorists of the location of the checkpoints, Lt. Fladseth indicated that there will be signs stationed approximately 1/4 mile from the checkpoint, which indicate that the motorist is entering a checkpoint.

The Court further notes that the Guidelines, at least in theory, contemplate that motorists will be able to turn around before entering into the checkpoint. Additionally, Lt. Slaughter indicated that a person could refuse to roll down his or her window. However, the Court notes that Col. Hough and Lt. Slaughter both stated that the public would not be informed that they could refuse to drive through the checkpoints, nor would the signs advertising the approach indicate these features.

Nor does the fact that the Guidelines contemplate that motorists could turn around or turn off, decrease the level of surprise or fright engendered in encountering checkpoints, since the voluntariness of motorist' participation is largely illusory, due to the failure of the defendants to make any provision to alert the public that

they did not have to go through a checkpoint, but rather could legitimately avoid it by turning off the road or by making a U-turn. Additionally, the voluntary nature of participation in going through checkpoints is also shown to be a fiction, since the defendants would not, in siting the checkpoints, insure that it was located where people could safely and legally make U-turns or turn-offs.

Finally, with respect to the amount of surprise or fear created by such roadblocks, there is no dispute that at least the publicly stated purpose of checkpoints and the actual activities of the police in operating checkpoints is to search for violators of criminal law. Thus, the potential for checkpoints in generating fear in motorists as they pass through is heightened.

In further considering the degree of subjective intrusion upon individual liberty

that sobriety checkpoints may have, the Court examines the amount of discretion left to on-the-scene officers. Lt. Slaughter testified that the personnel who would operate the checkpoints were given some training as to how to conduct themselves. During the course of the operation of the checkpoints, the Guidelines indicated that all vehicles were to be stopped. This was borne out by the testimony of Lt. Fladseth who testified that the police would be instructed to stop all vehicles. Col. Hough's testimony indicates that the discretion of individual officers' operation of checkpoints would be further diminished by the presence of a senior officer with the rank of lieutenant or above. However, on-the-scene officers were left to their own discretion as to whom they would pull over for further investigation. In this regard, the Guidelines, as well as the testi-

mony of Lt. Slaughter, indicates that the standards used by the on-the-scene officers for determining whether a particular person should be further detained due to evidence of intoxication, were those standards commonly used by police to stop vehicles in order to investigate for possible drunk driving.

Regarding the discretion of on-the-scene officers as to where to locate checkpoints, the Guidelines indicate that this decision is one made by supervisory personnel. Lt. Fladseth further testified that the decision as to where to site a checkpoint was based primarily on data retrieved from the Michigan Accident Location Index (MALI) system which indicated, where alcohol related accidents and fatalities were most severe, as well as the time of day when such accidents were most likely to occur. The Court, based on this evidence as it relates to the plan

involved in the case at bar, finds that there is no discretion to on-the-scene officers as to where checkpoints will be located, and that the location and time of implementing checkpoints will be determined by neutral criteria.

Accordingly, in further considering relevant factors in making a determination as to the subjective nature of the intrusive character of the checkpoints, the Court finds that the Guidelines established to implement the plan, will ensure that on-the-scene officers' discretion relative to the operation of sobriety checkpoints will be minimal.

Finally, in determining the degree to which these checkpoints subjectively intrude on a person's individual liberty, the Court looks to the degree to which sobriety checkpoints are consistent with traditionally protected liberty and privacy interests.

There is no doubt that under the Fourth Amendment, persons do have a reasonable, if somewhat diminished, expectation of privacy while travelling the roads in their automobiles. Delaware v Prouse, supra, 440 US at 662. This reasonable expectation of privacy has traditionally meant that there are limits on the power of the State to stop and seize motorists.

This has meant that the police must have at least an articulable suspicion of wrongdoing or some other approved basis, before they are permitted to stop vehicles for investigating purposes. As noted by the Court in Carroll v United States, supra, 267 US at 153-154:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary, because of national self-protection

> reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

In the case at bar, the law enforcement technique sought to be implemented under the defendants' plan, namely sobriety checkpoints, goes beyond the traditionally recognized reasons for stopping motorists in their cars. The implications of such a procedure being approved are grave indeed. Some of these are stated by the Court in State v Smith, supra, 674 P2d at 564-565.

> The Court finds such activities by law enforcement authorities, while commendable in their ultimate goal of removing DUI offenders from the public highways, draw dangerously close to what may be referred to as a police state. Here, the state agencies have ignored the presumption of innocence, assuming that criminal conduct must be occurring on the roads and highways, and have taken an 'end

justifies the means' approach. The Court is not so naive to think that criminal conduct does not occur regularly in the form of DUI offenders. Yet, a basic tenet of American jurisprudence is that the government cannot assume criminal conduct in effectuating a stop such as the one presented herein. Were the authorities allowed to maintain such activities as presented in this case, the next logical step would be to allow similar stops for searching out other types of criminal offenders. For example, it is well known to the public that shoplifting is an everyday occurrence which constantly plagues merchants in Oklahoma and elsewhere. Are law enforcement authorities then to be allowed to establish fixed checkpoints, permanent or otherwise, outside of every shopping center in the area to question all existing shoppers as to whether they possess sales receipts? Are law enforcement authorities to be allowed to demand all shoppers to produce such receipts or be subject to arrest every time they go shopping? The potential for abuse is apparent.

See also, Webb v State, supra, 695 SW2d at 683; State ex rel Ekstrom v Justice Court, supra, 663 F2d at 997 (Feldman J., conc.): State v Crom, supra, 383 NW2d at 469-470 (Krovosha, CJ., conc.).

Given the potential for abuse[15] that lies in approval of such procedures, the Court finds that sobriety checkpoints have a significant potential for intruding on traditionally protected liberty and privacy interests, and thus are not consistent with such interests.

---

[15]This potential for abuse is not merely hypothetical. In the instant case the Court notes that the statute which authorizes the State Police to set up sobriety checkpoints also authorizes local police departments to set up their own checkpoints.

Given the inclination, local police forces could set up sobriety checkpoints on roads indentified by a system such as MALI as having a drunk driving problem. It is not inconceivable that several checkpoints could be set up along the same road which happened to run through several cities or townships. It is not inconceivable therefore that a motorist could encounter several checkpoints in a short period of time while driving through several municipalities. Certainly it must be concluded that such a system of checkpoints would be repugnant to traditional notions of individual liberty. See State v Deskins, supra, 673 P2d at 1158 (Praeger, J., diss.); United States v Carroll, supra.

Under the above findings, relative to the subjective intrusion on individual liberty interests, occasioned by sobriety checkpoints, the Court finds that the checkpoints sought to be implemented in this case do have the potential for generating significant degrees of surprise and fear in motorists passing through them. The Court also finds that the discretion of the police in operating such checkpoints and determining their location is severely limited. Added into this equation, however, is the further finding that such checkpoints are not truly consistent with traditionally protected liberty and privacy interests.

While it may be argued that the lack of discretion of the police officers does indicate that the subjective intrusion may not be great, on balance, when the Court takes into account its finding that such

checkpoints will generate surprise and fear, together with its finding that such checkpoints are inconsistent with traditionally protected individual liberty and privacy interests, the Court concludes that the latter two findings outweigh the former. The Court thereby finds that sobriety checkpoints of the type which are contemplated by defendants' plan do have a significant subjective intrusive impact on a person's liberty interest.

3. CONCLUSIONS OF LAW

In reviewing the foregoing findings of fact relative to applying the Brown test to the case at bar, the Court initially observes that given the warrantless nature of the seizures authorized by the Guidelines which would occur at sobriety checkpoints, the burden of establishing the lawfulness of the seizures under the Fourth Amendment falls

on the defendants. Commonwealth v McGeoghegan, supra, 449 NE2d at 353; State v McLaughlin, supra, 471 NE2d at 1136; Webb v State, supra, 695 SW2d at 681. Thus in applying the Brown test to the case at bar, the Court proceeds under the assumption that the defendants have the burden of showing that the seizures of persons at checkpoints would be reasonable, and thus satisfy the Fourth Amendment. Put another way, it is incumbent on defendants to show a) a legitimate state interest, b) that the checkpoints substantially furthered that interest; and c) that both the objective and subjective intrusion on an individual's liberty interest was minimal.

In so fixing defendants' burden of proof, the Court is mindful of the way the United States Supreme Court resolved the balancing test in Brignoni-Ponce,

Martinez-Fuerte and Prouse.

As recounted earlier, in Brignoni-Ponce the warrantless random stop of vehicles by the Border Patrol was held unconstitutional. Although the Court found a public interest, and that the procedure did further that interest, the Court found, in essence, that there was substantial subjective intrusion of individual liberty since there were no standards governing the exercise of the discretion of the Border Patrol's agents. In Prouse, the warrantless, random stop of a vehicle made by police to check the driver's license and vehicle registration was held unconstitutional because the procedure did not further the State interest and there were no limits on the exercise of police discretion notwithstanding a finding of state interests. By way of contrast in Martinez-Fuerte, the Court held constitu-

tional the warrantless stop of cars at check-points along major thoroughfares on the Mexican-American border, which were designed to check for illegal entry in this country, because the government was shown to have a substantial interest in preventing illeqal aliens from entering into this country, the procedure substantially furthered that interest and the objective and subjective intrusion were both deemed minimal. Thus in this trilogy of cases which exemplify the practical application of the test later synthesized in Brown, the warrantless stopping of cars by the police, who otherwise had no articulable suspicion of wrongdoing, was found to meet constitutional muster only where all three elements of the Brown test were shown to be present in the government's favor.

Applying these principles of law to

the facts found in the case at bar, the Court finds that the defendants have failed in their burden of proof. As noted above, the evidence indicates the State does have a keen interest in curbing drunk driving. Yet the evidence indicates that sobriety checkpoints have only a minimal degree of effectiveness in curbing drunk driving. In this regard the Court found that sobriety checkpoints can be used to effectuate only an extremely low number of arrests, and that they have no potential for a sustained deterrent effect. Morever, the evidence has been replete with examples of reasonable constitutionally approved alternative procedures, which could and did curb drunk driving. Finally, while the evidence showed that the objective intru-sion on individual liberty interests was minimal, the Court found the evidence showed that the subjective intrusion on individual

liberty interests which would be caused by the sobriety checkpoints was substantial.[16]

Accordingly, the Court concludes that application of the Brown test to the case at bar results in a finding that the sobriety checkpoints contemplated under the Guidelines of defendants is violative of the Fourth Amendment as applied to the States through the Fourteenth Amendment.

C. Sobriety Checkpoints are per se unreasonable, and thus unconstitutional under the Michigan Constitution.

While the foregoing discussion and resolution of plaintiffs' challenge to defendants' plan under the Fourth Amendment would

[16]It is precisely because this Court finds, based on the factual record before it, that the second and third elements of the Brown test have not been satisfied that the Court finds uncontrolling the appellate authority from other states referred to earlier that have found sobriety checkpoints constitutional.

appear to be dispositive, the Court recognizes that plaintiffs challenged the plan under Michigan Const 1963, Art 1, § 11. In order to render a complete decision on all of the issues raised herein, the Court will proceed to pass on the merits of plaintiffs' claim under the Michigan Constitution.

Initially, the Court notes that defendants asserted that this Court's analysis of the case under the Michigan Constitution be no different from that of our analysis of the case under the Fourth Amendment. The basis of their assertion is that our State Constitution provides no greater protection than does the Federal Constitution. In support of their contention that the two constitutions be read to provide identical protection, they rely on People v Smith, 420 Mich 1 (1984).

In People v Smith, supra, 26-28, the Court held that the test to determine a per-

son's standing to contest a search or seizure under the Mich Const. 1963, Art 1, § 11, was the same test used to determine standing under the U.S. Const. Am IV. Yet in doing so, the Court specifically acknowledged that "in the past we have on occasion offered defendants greater protection under Art 1, § 11, than the Supreme Court of the United States has offered under the Fourth Amendment." Id., 420 Mich at 19. Thus the defendants' contention that this Court must adhere to the construction given the Federal Constitution by the United States Supreme Court in construing the Michigan Constitution is simply not accurate.[17] Accordingly, the

[17]It should be noted that People v Chapman, ___ Mich ___ Docket #75751, Decided June 6, 1986, involving the suppression of certain evidence is not controlling. The case at bar does not involve the suppression of any evidence.

Court approaches also the constitutionality of sobriety checkpoints through a separate consideration of Michigan precedent construing Mich Const 1963, Art 1, § 11. This provision provides in relevant part:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, support by oath or affirmation."

Initially it is important to note that all agree that the stopping of motor vehicles at a sobriety checkpoint is a seizure within the meaning of both constitutions. Therefore Art 1, § 11's proscription against unreasonable searches and seizures is involved.

Most recently our Supreme Court in Tallman v Department of Natural Resources, 421 Mich 585, 598-599 (1984) stated the tra-

ditional general rule as to when a search is unreasonable under Art 1 § 11 as follows:

> "A warrantless search is unreasonable per se and violates the Michigan Constitution unless shown to be within an exception to this rule . . . This Court has sanctioned warrantless searches by law enforcement officers who have probable cause to believe that a violation of the law has occurred when exigent circumstances make obtaining a warrant unfeasible." (citation to authorities omitted).

This rule is reflected in the Court's treatment of searches and seizures of persons in automobiles as summarized in People ex rel Attorney General v Lansing Municipal Judge, 327 Mich 410, 424-425 (1950) (a case decided exclusively under the Michigan Constitution):

> Likewise, in Carroll v United States, supra, it was said that persons entitled to use the highways have a right to free passage without interruption or search except upon probable cause for believing the law to be violated. Furthermore, the mere refusal of a person to submit to search is not such a fact as gives rise to probable cause to believe that an offense is being committed entitling the officer to proceed with the search. State v Gibbs, 252 Wis 227 (31 NW2d 143). Neither may an officer make a search on

> the basis of mere suspicion without probable cause to believe that the law is being violated. See People v Stein, 265 Mich 610 (92 ALR 481), and People v Roache, supra, in which this Court held that an officer may not stop automobiles upon public highways promiscuously and demand the showing the drivers' licenses as a subterfuge for the purpose of invading the travelers' constitutional rights and then searching the automobiles for liquor.

While it may be that since Lansing Municipal Judge was decided, further developments in stare decisis would hold that a police officer could make an initial investigation stop of a motor vehicle upon the articulable reasonable suspicion that a law was being violated, see, People v Lillis, 64 Mich App 64, 70 (1975) (and cases cited therein), People v Bloyd, 96 Mich App 264, 267 (1980), aff'd 416 Mich 538 (1982) (and cases cited therein), nonetheless, the Court is aware of no Michigan authority construing the Michigan Constitution, nor do defendants cite to any,

which would authorize or even suggest approval for the seizure of motorists absent at least an individualized articulable suspicion that some criminal wrongdoing had or was about to occur. Yet this is precisely what defendants' plan allows the police to do; namely, it contemplates the seizures of motorists without any showing of an individualized articulable suspicion that the particular motorist was involved or was about to become involved in some criminal activity. The plan thus falls below that minimal level of what the police must presently have in order to stop and seize motorists.

The defendants having failed to show that their plan falls within any of the exceptions to the warrant requirement of Mich Const 1963, Art 1, § 11, the Court finds the seizures contemplated under the plan per se unreasonable, and hence violative of Mich

Const 1963, Art 1, § 11.[18]

IV. CONCLUSION

In summary of the above findings, the Court finds that the Guidelines to implement sobriety checkpoints which were drafted by defendants do not run afoul of the requirements of the Michigan Administrative Procedures Act; and that there is statutory authority for the operation of sobriety checkpoints. Therefore, no relief can be granted under these claims. However, the Court further finds that defendants' plan to

---

[18]It should be noted that this Court's conclusion is supported by the reasoning and result reached in Commonwealth v Tarbert, ___ Pa supra ___; 502 A2d 221 (1985) (holding sobriety checkpoints per se unconstitutional under the Pennsylvania Constitution). As in Tarbert, the above decision rendered by the Court finding the sobriety checkpoint plan unconstitutional under Mich Const. 1963, Art 1, § 11, thus rests on "bona fide, separate, adequate, and independent [state] grounds ..." See, Michigan v Long, 463 US 1032, 1041; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

conduct sobriety checkpoints is violative of the Fourth Amendments of the United States Constitution and Article One, Section Eleven of the Michigan Constitution.

Accordingly, it further follows that plaintiffs are entitled to the issuance of a permanent injunction enjoining the defendants from implementing their plan to conduct sobriety checkpoints.

MICHAEL L. STACEY, Judge
Third Judicial Circuit of
Michigan

DATED: 24 JULY, 1986

DETROIT, MICHIGAN.

MLS:jg

MICHIGAN STATE POLICE

SOBRIETY CHECKPOINT GUIDELINES

Traffic Services Division

May 1986

ACKNOWLEDGEMENTS

These guidelines were first developed by Sergeant Mark DeHaan, Michigan State Police, Traffic Services Division, in anticipation of the department becoming involved in a statewide, alcohol sobriety checkpoint program in Michigan.

In February 1986, Colonel Gerald L. Hough appointed a Sobriety Checkpoint Advisory Committee composed of representatives of the state police, local law enforcement, prosecuting attorney, and the University of Michigan Transportation Research Institute. Their charge was as follows.

> The purpose of the Sobriety Checkpoint Advisory Committee is to work with state police staff in reviewing proposed guidelines, possible checkpoint locations, and operation plans and to make recommendations to the Director regarding program implementation. This program is considered a joint effort between local and state law enforcement, and the thoughts and ideas of each member are solicited so as to enhance the overall success of the program.

Sobriety Checkpoint Advisory Committee Members:

Colonel Gerald L. Hough, Chairman

Inspector LeRoy Fladseth, Michigan State Police, Traffic Services Division

Sheriff Allan Davis, Ingham County Sheriff Department

Chief Neal Agachinsky, Flint Township Police Department, representing the Michigan Association of Chiefs of Police

Chief Robert Foster, East Lansing Police Department

Chief John Amthor, Meridian Township Police Department

Mr. Kim Warren Eddie, Ingham County Prosecutor's Office

Lieutenant William Slaughter, Michigan State Police, Traffic Services Division

Sheriff Tom Edmonds, Kalamazoo County Sheriff, representing the Michigan Sheriffs Association

Captain Edward Lenon, Michigan State Police, First District Headquarters

Mr. Sheridan Rhoads, Office of Highway Safety Planning

Mr. Lyle Filkins, University of Michigan Transportation Research Institute

Associate Members:

Captain Kenneth Casperson, Michigan State Police, Traffic Services Division

Captain Richard Abbott, Ingham County Sheriff Department

Sergeant William Shelton, Meridian Township Police Department

Lieutenant Gary Howell, East Lansing Police Department

First Lieutenant Richard Jarman, Michigan State Police, Lansing Post

Mr. Ted Stopczynski, Michigan State Police, Executive Division

Professional Staff:

Mr. Robert Ebersole, Ingham County Prosecutor's Office

Lieutenant Wesley Hubers, Michigan State Police, Traffic Services Division

First Lieutenant Hugh Thomas, Michigan State Police, Traffic Services Division

Sergeant John Shotwell, Michigan State Police, Traffic Services Division

Sergeant Marshall Weeks, Michigan State Police, Traffic Services Division

These guidelines are the result of careful research and consultation with members of the above Sobriety Checkpoint Advisory Committee and law enforcement agencies of other states where success has been experienced. Special appreciation is extended to the members of the Maryland State Police for their help and unselfish willingness to share information. Much of the Maryland State Police checkpoint program, with specific attention given to the rights of the individual, has been incorporated in these guidelines.

TABLE OF CONTENTS

	Page
I. PURPOSE	1
II. BACKGROUND INFORMATION	1
III. OVERVIEW	4
IV. GOALS	5
V. OBJECTIVES	5
VI. SITE SELECTION	5
A. General Site Locations	5
B. Specific Site Selection	6
VII. OPERATION	7
A. Briefing and Debriefing	7
B. Scheduling	7
C. Safety Considerations	8
D. Equipment	9
E. Motorist Contact	9
F. Staffing	10
1. Command Personnel	10
2. Approach Safety Officer	11
3. Observation Officer	11
4. Data Collection Officer	12

5. Lane Safety Officer. 12

6. Checkpoint Contact Officer . 12

7. Support Personnel 14

APPENDIX

A. 2-Lane Configuration 15
B. 4- or 5-Lane Configuration . . . 16
C. Equipment List 17

[Note: Because of difficulty in complying with this Court's printing requirements, the appendices, consisting of diagrams and a list, have been omitted.]

IMPLEMENTATION OF SOBRIETY CHECKPOINT PILOT PROGRAM IN MICHIGAN

I. PURPOSE

The purposes of these Guidelines are:

A. To provide background information that demonstrates the need for additional efforts directed to reduction of alcohol-related crashes in Michigan.

B. To provide policy and procedural guidelines by which a pilot program for sobriety checkpoints is to be operated in Michigan.

C. To provide checklists of recommended equipment for conducting sobriety checkpoints.

II. BACKGROUND INFORMATION

Over the last several years, victims of alcohol-involved accidents and other anti-

drunk driving activities have promoted legislative and program initiatives in many states to curb drunk driving. Yet, in spite of this increase in legislative and countermeasure activity, drunk driving remains a serious problem and is one of our nation's most serious public health, transportation, and safety issues. Michigan 1984 alcohol-related traffic crash statistics reveal that 800 persons died, 28,681 suffered personal injury, with a total economic cost of $351,959,000. Therefore, if drunk driving is to be reduced significantly through law enforcement efforts, motorists must be persuaded that if they drive while intoxicated, there is a strong likelihood they will be arrested and face the ensuing consequences. Authorities agree that many drunk drivers persist in their behavior

because of a perceived low risk of arrest. While the rate of drunk driving arrests may depend largely upon the aggressiveness of law enforcement efforts, estimates of the probability of arrests vary from one in two hundred drunk drivers to one in two thousand.

The impact of increased enforcement efforts to curb the drunk driver is frequently blunted by lengthy court backlogs, particularly as the judicial system struggles to impose recently enacted tougher sanctions. While no single program will produce a solution to the complex problem of driving while intoxicated, sobriety checkpoints have the potential to produce a major change in the deterrence climate in this state.

Sobriety checkpoints have been used successfully in numerous states and have the

potential of enhancing Michigan's OUIL enforcement efforts by presenting both a real and perceived risk of being apprehended for drunk driving. Since every driver is potentially subject to being stopped, sobriety checkpoints are believed to have a high deterrent effect in that they preclude drunk drivers from assuming they can avoid police detection by simply driving "cautiously."

One of the first questions to be raised about sobriety checkpoints is that of constitutional authority. On March 24, 1986, the U. S. Supreme Court refused to hear arguments that challenged the Virginia Sobriety Checkpoint Program on grounds that it constituted an unreasonable search and seizure. Numerous state courts have also ruled that sobriety

checkpoints are legal as drunk driving countermeasures. Where there has been an adverse court decision, the decision was based on some procedure held to be improper which, when corrected, made the sobriety checkpoint program perfectly legal. It is most imperative that sobriety checkpoints in Michigan be conducted in the utmost professional manner with predetermined goals and objectives. In this pilot sobriety checkpoint proposal, specific measures have been taken to avoid abuses and errors and ensure constitutional guarantees.

In Michigan, the statutory authority to operate such checkpoints is contained in the Michigan Vehicle Code, Act No. 300, P.A. 1949, as amended, Section 257.715(2). However, it has been argued by many that

checkpoints could be legally operated even without such authority. The Michigan Drunk Driving Task Force, in concert with the 1983 report of the President's Commission on Drunk Driving, has recommended that the Michigan Office of Highway Safety Planning, the University of Michigan Transportation Research Institute, and the Michigan Department of State Police develop a pilot program to test the effectiveness of sobriety checkpoints. An overview of that pilot program follows.

III. OVERVIEW

Sobriety checkpoints are intended to impact the drunk driving problem by increasing the perception that the drunk driver will be detected and arrested.

Sobriety checkpoints will be conducted at times and in places where alcohol and drug use has caused traffic danger. Every vehicle passing through the checkpoint will be stopped. A police officer will make a quick determination of the driver's condition. Motorists who are sober will be passed through quickly, while those who exhibit symptoms of intoxication or drug use will be detained for additional screening.

An integral aspect of the pilot program will be to publicize the deployment of sobriety checkpoints to attain maximum public awareness and voluntary compliance with OUIL laws. This increased awareness will be reinforced by implementation of the checkpoints.

Another aspect of the program design is to inform the motorist and monitor the

public's reaction to sobriety checkpoints. A driver's survey card and brochure will be distributed to all drivers passing through the checkpoint. The survey card will be a detachable pre-addressed questionnaire covering drivers' reactions to the checkpoint. In addition, an informational brochure will be distributed which explains the purpose of the sobriety checkpoint program and provides helpful information regarding the effects of alcohol at various consumption levels.

IV. GOALS

-- Deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents.

-- Conduct checkpoints with a minimal amount of intrusion or motorist inconvenience.

-- Assure the safety of the general public as well as law enforcement officers involved.

V. OBJECTIVES

-- Increase the perception of "risk of apprehension" in the minds of those drivers who would operate a vehicle while under the influence of alcohol or controlled substances.

-- Ensure that the constitutionally guaranteed rights of individuals are protected.

-- Remove intoxicated drivers from the public highways.

VI. SITE SELECTION

The criteria and data used to determine each site selection will be recorded and maintained.

A. General Site Locations

1. Sobriety checkpoints shall be conducted at selected locations to monitor traffic for driver sobriety. These locations shall be based upon criteria, as approved by the Director of the Department of State Police, which consider the previous alcohol and drug experience per time of day and day of week as identified by arrests and/or Michigan Accident Location Index data.

2. The selection of target highways within the state will be chosen with consideration given to the following.

   a. Alcohol-involved accident experience.

   b. Prosecution interest and statutory potential.

   c. Local law enforcement cooperation.

   d. Law enforcement resource availability.

B. Specific Site Selection

The choice of specific checkpoint sites within the target highways shall be based on the following.

1. Safety of the location for citizens and law enforcement personnel. The site selected shall have a safe area for stopping a driver and must afford oncoming traffic sufficient sight distance for the driver to safely come to a stop upon approaching the checkpoint.

2. The location must ensure minimum inconvenience for the driver and facilitate the safe stopping of traffic in one direction during the pilot program.

3. Roadway choice must ensure that sufficient adjoining space is available to pull the vehicle off the traveled portion of the roadway for further inquiry if necessary.

4. Consideration should be given to the physical space requirements as shown in Appendixes "A" and "B."

VII. OPERATION

A. Briefing and Debriefing

Uniform officers at checkpoint locations are to be given instruction

regarding the procedure to be followed. This shall consist of a briefing to be conducted at a predetermined location and time. At the briefing, the officers will be instructed as to the exact location of the sobriety checkpoint, legal considerations involved, the procedure to be followed in approaching a vehicle, the initial contact with its driver, and what to do in specific situations.

A debriefing shall be conducted immediately following the checkpoint operation. The purpose is to provide an immediate critique of the operation and receive constructive comment from those involved.

B. Scheduling

1. During the pilot program the sobriety checkpoint will be maintained at a given location for a time period consistent with the activity experienced.

2. Although the exact time and location of sobriety checkpoints will not be made public in advance, their use will be widely publicized to enhance the desired deterrent effect among potential drunk drivers.

C. Safety Considerations

1. Each site will be staffed by a sufficient number of uniformed police officers to maintain a safe and efficient operation.

2. Appropriate reflectorized safety equipment shall be provided and uti-

lized by all personnel. This may include flares and/or reflectors to illuminate the site and aid in traffic direction. Warning signs, flares, cones, and/or emergency lighting equipment will be utilized and conspicuously displayed to provide advance notice of the impending stop.

3. It is imperative that communication is available to all involved during checkpoint operations. This is to be accomplished through the use of walkie-talkie radios assigned to checkpoint personnel.

4. Officers on point should use a flashlight with orange cone attached to direct traffic movement.

D. Equipment

For the purpose of the pilot program, Appendix "C" contains a list of equipment representative of that needed to establish a sobriety checkpoint.

E. Motorist Contact

1. All traffic passing through the checkpoint site shall be stopped. An officer will approach each driver and identify him or herself by title and department. The officer will advise each driver contacted that he/she is at a sobriety checkpoint intended to identify drunk and/or drugged drivers. If there is no evidence of intoxication, the officer will hand the driver a brochure explaining the program, as

well as a mail-back survey card, and direct the motorist on his/her way.

2. During the brief stop and contact with the driver, the officers will be alert for articulable indications of intoxication. These may include an odor of intoxicants about the driver, slurred speech, lack of physical coordination, unusual eye movements, disorientation, or other behavior commonly associated with OUIL or OUID.

3. Should indications of intoxication be present, the driver will be directed to move to an out-of-traffic location and then asked for his/her operator's license and vehicle documents.

4. The driver may then be requested to perform field sobriety tests and may be asked to take a pre-arrest breath test. If sufficient evidence of intoxication is present, the driver will be arrested; if insufficient symptoms of intoxication exist, the driver will be released.

5. If a driver approaching a sobriety checkpoint deliberately avoids the checkpoint process by either turning around or turning off the highway, the decision to pursue will be based upon the observed driving behavior. If it appears from the driving behavior that the driver may possibly be intoxicated, a decision to follow may be authorized by checkpoint command personnel.

F. Staffing

The sobriety checkpoint operation should consist of the following identified positions with their respective duties and responsibilities.

1. Command Personnel

A state police commissioned officer of Lieutenant rank or higher shall be the officer in charge at the sobriety checkpoint location. An assistant position is optional and may be assigned as needed. Responsibility shall include direct overall supervision of the officers assigned to the checkpoint and the proper operation of all activities in accordance with departmental approved policies, procedures, and guidelines.

If, at any time during the operation of the checkpoint, traffic congestion or other circumstances arise that warrant the discontinuing of the operation, the state police commissioned officer at his/her discretion may close down the operation for any length of time necessary.

2. Approach Safety Officer

This officer with a vehicle will be stationed along the shoulder of the highway in the approach to the checkpoint. Responsibility includes observing vehicles in their approach to the checkpoint and providing advance warning to officers at the checkpoint site of any potentially hazardous activities, such as an obvious drunk or reckless driver

coming into the checkpoint location. This officer shall not leave his/her position as long as the checkpoint is in operation.

3. Observation Officer

Officers with vehicles, assigned at both ends of the checkpoint, observe traffic entering and leaving the checkpoint. These positions are responsible to being alert for vehicles which may avoid the checkpoint and determining if their driving behavior exhibits that of a potential intoxicated driver. They would only pursue after reporting their observations to the command officer and receiving permission to follow.

If the driver of the observation vehicle leaves his/her site, an officer in reserve may replace him/her at that site if replacements are available.

4. Data Collection Officer

This officer is responsible for keeping an accurate activity record of those vehicles and activities required by departmental authority.

5. Lane Safety Officer

This officer is responsible for ensuring that all fusees are kept burning during the checkpoint operation and all cones remain in place. In addition, remaining alert for any other safety hazards in the lanes themselves shall be an included responsibility.

Fusees should be used only at the approach to the checkpoint and not within the actual checkpoint area. A metal container shall be used for expended fusees.

6. Checkpoint Contact Officer

These positions shall be stationed at the checkpoint location at predetermined distances apart. It shall be their responsibility to make contact with the respective motorists and make a determination of intoxication.

Officers will be assembled in the roadway to check motorists for articulable signs of intoxication. These officers will wear department-issued reflectorized vests and uti-

lize orange cones attached to their flashlights for traffic direction and control.

All traffic entering the checkpoint will be stopped. A uniformed police officer will approach the motorist and state, "I am Trooper (Officer) _____ of the Michigan State Police (local police department). You have entered a sobriety checkpoint set up to identify intoxicated drivers." If there is no immediate evidence of intoxication, a traffic safety informational brochure and survey card will be given to the motorist.

During the brief stop, the officer will look for articulable signs of intoxication such as an odor of

alcohol about the driver, slurred speech, and other behavior normally associated with OUIL or OUID violators. If the officer observes symptoms of intoxication, the driver will be directed to a predetermined "safe area" for further investigation. If the situation warrants, the driver will be asked to submit to a preliminary breath test; and if sufficient evidence of intoxication is observed, the driver will be arrested.

The checkpoint officer shall remain with the driver from initial contact to the arrest or release. When the officer leaves the lane, he/she is to be replaced by another officer, if available.

7. Support Personnel

Additional personnel may be assigned as replacement or support officers for any of the above positions, or for other duties which may be identified as necessary in the conduct of a safe and efficient sobriety checkpoint operation.

STATE COURT APPELLATE DECISIONS CONCERNING ROADSIDE SOBRIETY CHECKPOINTS

State	Const.	Case Name and Citation
Alabama		
Alaska		
Arizona	Yes	State v Superior Court, 691 P.2d 1073 (1984)
Arkansas	Yes	Coffman v State, 759 SW2d 573 (1988)
California	Yes	Ingersol v Palmer, 175 Cal App 1028; In Re Richard T, 185 Cal App 3d 855 (1986) cert den Richard T v California, ___US___(1988)
Colorado		
Connecticut		
Delaware		
Florida	Yes	State v Jones, 483 So.2d 433 (1986)
Georgia	Yes	State v Golden, 318 S.E.2d 693 (GA. App. 1984)
Hawaii		
Idaho		
Illinois	Yes	People v Bartley, 486 N.E.2d 880 (1985)

Indiana	Yes	State v Garcia, 481 N.E.2d 148 (Ind. App. 1 Dist. 1985)
Iowa	Yes	State v Riley, 377 N.W.2d 242 (1985)
Kansas	Yes	State v Deskins, 673 P.2d 1174 (1983)
Kentucky	Yes	Kinslow v Commonwealth, 660 S.W.2d 677 (Ky App, 1983), cert den Kinslow v Kentucky, 465 US 1105 (1984)
Louisiana	Yes	City of Baton Rouge v Dyson, 536 So.2d 1297 (1988)
Maine	Yes	State v Leighton, 551 A2d 116 (1988)
Maryland	Yes	Little v State, 479 A.2d 903 (1984)
Massachusetts	Yes	Commonwealth v Trumble, 483 N.E.2d 1102 (1985)
Michigan	No	Sitz v State Police, 170 Mich App 433 (1988)
Minnesota	No	State v Muzik, 379 N.W.2d 599 (1985)
Mississippi	Yes	Miller v State, 373 So.2d 1004 (1979)
Missouri		
Montana		

Nebraska	possible under prescribed conditions	State v Crom, 383 N.W.2d 461 (1986)
Nevada		
New Hampshire	No	State v Koppel, 499 A.2d 977 (1985)
New Jersey	Yes	State v Egan, 516 A.2d 1115 (1986)
New Mexico	Yes	City of Las Cruces v Betancourt, 735 P.2d 1161 (1987)
New York	Yes	People v Scott, 473 N.E.2d 1 (1984)
North Carolina		
North Dakota		
Ohio		
Oklahoma	No	State v Smith, 674 P.2d 562 (1984)
Oregon	Yes	State v Shankle, 647 P.2d 959 (1982)
Pennsylvania	No based on state const	Commonwealth v Tarbert, 502 A.2d 221 (Pa. Super 1985)
Rhode Island		
South Carolina		
South Dakota	No	State v Olgaad, 248 N.W.2d 392 (1976)

Tennessee		
Texas	No	Webb v State, 695 S.W.2d 676 (1985)
Utah		
Vermont	Yes	State v Martin, 496 A.2d 442 (1985)
Virginia	Yes	Lowe v Commonwealth, 337 S.E.2d 273 (1985) cert den Lowe v Virginia, 475 US 1084 (1986)
Washington	Yes	Fury v City of Seattle, 730 P.2d 62 (1986)
West Virginia		
Wisconsin		
Wyoming		

Supreme Court, U.S.
FILED
JUN 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1897

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police.

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR. DOMINIC J. JOCOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

MARK GRANZOTTO
Counsel of Record
One Kennedy Square, Ste 2204
Detroit, Michigan 48226
(313) 964-4720

DEBORAH L. GORDON
Attorney for Respondents
1600 Ford Building
Detroit, Michigan 48226
(313) 962 -3784

WILLIAM C. GAGE
Attorney for Respondents
1818 Buhl Building
Detroit, Michigan 48226
(313) 963-8890

QUESTION PRESENTED

Whether the Michigan Court of Appeals properly concluded on the basis of the record established in the trial court that the Michigan State Police sobriety roadblock program was unconstitutional, in violation of the Fourth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.	i
INDEX OF AUTHORITIES.	iii
STATEMENT OF THE CASE	1
ARGUMENT.	11
I. BASED ON THE RECORD IN THIS CASE, THE CONCLUSION THAT SOBRIETY ROADBLOCKS CONSTITUTE A VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS PROPER.	11
A. Gravity of the Public Concern.	12
B. The Degree to Which the Seizure Advances the Public Interest.	13
C. The Severity of the Interference with Individual Liberty.	22
II. THE MICHIGAN CONSTITUTION CONSTITUTES AN ADEQUATE AND INDEPENDENT STATE GROUND PRECLUDING REVIEW BY THIS COURT.	33
CONCLUSION.	35

INDEX OF AUTHORITIES

Cases:	Page
Almeida-Sanchez v United States, 413 U.S. 266 (1973).	23
Brown v Texas, 443 U.S. 47 (1979). .	passim
Delaware v Prouse, 440 U.S. 648 (1979)	12,22
Michigan v Long, 463 U.S. 1032 (1983)	34
National Treasury Employees Union v Von Raab, ___ U.S. ___; 109 S.Ct. 1384 (1989).	31,32,33
Pennsylvania v Mimms, 434 U.S. 106 (1977)	24
Sitz v Department of State Police, 179 Mich. App. 433; 429 N.W.2d 180 (1988).	19
Skinner v Railway Labor Executive Assoc., ___ U.S. ____; 109 S.Ct. 1402 (1989).	passim
State v Smith, 674 P.2d 562 (OK Crim. App. 1984)	29-30
Texas v Brown, 460 U.S. 730 (1983)	24
United States v Martinez-Fuerte, 428 U.S. 543 (1976).	23,30
Constitution:	
U.S. Const, Amend IV	passim

Other Authorities:

J. Jacobs & N. Stossen, "Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks," 18 U.C. Davis L.R., 595 (1985) 28

STATEMENT OF THE CASE

This action was filed by Respondents in May 1986 seeking an injunction prohibiting the Petitioners from instituting sobriety roadblocks. Respondents alleged that the roadblocks violated rights secured by both the Fourth Amendment of the United States Constitution and Article I, §11, of the Michigan Constitution.

Hearings were conducted on Respondents' Motion for Preliminary Injunction in May and June 1986. During the course of these hearings, the parties stipulated that the trial court's decision on the Motion for Preliminary Injunction would also serve as the determination of Respondents' additional request for permanent injunctive relief.

At the hearing, Respondents demonstrated three general points: the manner in which the roadblocks would operate, how such roadblocks infringed on the privacy interests of the driving public, and, most importantly, that such roadblocks are not an effective means of addres-

sing the drunk driving problem.

One of these witnesses was Dr. Lawrence Ross, a professor of sociology at the University of New Mexico, and one of the nation's preeminent authorities on the subject of deterring the drinking driver. Dr. Ross testified that any law enforcement technique could have a short term favorable impact on drunk driving statistics if it creates a public perception that detection and punishment of the drinking driver is somehow enhanced. However, according to Dr. Ross' analysis of all studies on the subject, the deterrent effect of any drunk driving program diminishes rapidly if and when the driving public realizes that the prospects of detection and arrest as the result of this technique are not great. This phenomenon of rapidly dissipating deterrent impact was described by Dr. Ross as a learning curve: the public may, in the short term, alter its behavior in the face of a novel police practice, but, should the public come to recognize that the program does not increase the

certainty of punishment, the program no longer influences driving behavior.

Dr. Ross also testified that the "learning curve" phenomenon would apply to sobriety roadblocks. To be effective for even a limited period of time, roadblocks must be widely publicized and instill in the public the feeling that this police practice increases the possibility of detecting drunk drivers. However, as Dr. Ross testified, as a tool for arresting drunk drivers, sobriety roadblocks are worthless.

Data taken from a number of studies indicate that less than one percent of all drivers who pass through such roadblocks are arrested for drunk driving, and no study ever conducted has indicated a high roadblock arrest rate. Therefore, according to Dr. Ross, once the driving public grasps the limited arrest threat posed by roadblocks of this type, whatever short term deterrent effect this practice possessed would dissipate. Dr. Ross also noted that no report or study existed which demonstrated a long

term deterrent effect achieved through sobriety roadblocks.

Dr. Ross' testimony that sobriety roadblocks were not an effective tool in fighting drunk driving was reiterated by three other witnesses called by Plaintiffs, each of whom was a county sheriff in Michigan.

Macomb County Sheriff, William Hackel, testified that under his direction, his county implemented a number of programs which have been successful in removing drunk drivers from the roads. Based on his 23 years of experience in law enforcement, Sheriff Hackel indicated that these alternative programs would provide a better method for arresting and deterring drunk drivers. Sheriff Hackel further testified that the Michigan Sheriff's Association, of which he was President, voted to formally oppose the use of sobriety roadblocks in this state.

Sheriff Hackel's views on the sobriety roadblock concept were shared by the Sheriff of Kalamazoo County, Thomas Edmonds, and Wayne

County Sheriff, Robert Ficano. Sheriff Edmonds testified that traditional road patrols in which officers stop drivers for alcohol related offenses based on observed driving behavior are a more effective tool against drunk driving than roadblocks. He also expressed the view that the ineffectiveness of roadblocks as compared to roving patrols would be even more pronounced in the rural areas of his county.

Sheriff Ficano emphasized that the use of roving patrols, which stop vehicles based on an individualized suspicion, would be a more efficient manner of addressing the drunk driving problem. For this reason, Wayne County has refused to participate in the State Police roadblock program, and has no plans to adopt such a program.

The testimony given by Sheriffs Hackel, Edmonds and Ficano was motivated by a single overriding concern. As sheriffs, their jobs consist of providing citizens with the most effective method of fighting crime while recogniz-

ing the economic restraints placed on that goal. Confronted with the reality that they do not operate with unlimited resources, all three sheriffs agreed that roving patrols would be a more effective use of valuable law enforcement resources than committing 12 or more officers to a single location to conduct a roadblock at which the statistical likelihood of achieving arrests is minimal.

Colonel Gerald Hough of the Michigan State Police testified that between eight and 12 officers would be needed for the operation of a roadblock. These officers would be both State Police troopers and members of local law enforcement departments. Hough conceded that local officers working in sobriety roadblocks might have to be removed from other patrol responsibilities to assume roadblock duties.

Colonel Hough acknowledged that other states which have implemented sobriety roadblocks have not obtained large numbers of arrests. He therefore agreed with Dr. Ross' as-

sessment that the purpose of Michigan's program could not be to obtain significant drunk driving arrests. Hough maintained, instead, that the roadblock program is designed to deter drunk drivers. He conceded, however, that he had no empirical evidence of any kind to support the conclusion that roadblocks acted as a deterrent to drunk driving.

Following the presentation of Respondents' proofs, Petitioners called several witnesses, including Lieutenant Raymond Cotton of the Maryland State Police. The Michigan roadblock program had been patterned after Maryland's model. Lieutenant Cotton conceded that the only empirical evidence demonstrating the effectiveness of its program as a deterrent had to be derived from a three month pilot study conducted in two Maryland counties from December 1982 through February 1983. For that study,[1]

---

1 The statistical results derived from Maryland's pilot study are reprinted in the Appendix to this Brief.

Maryland authorities selected two demographically similar counties. In one of these counties sobriety roadblocks were instituted; in the other (the control county), no roadblocks were employed. Following the end of the three month study, the driving statistics in these two counties were analyzed in two respects. First, the relative performance of the two counties during the three month pilot program in which the checklanes were used was compared with the counties' respective statistics for the same three month period one year before. Second, the two counties' performance during the three month period was compared with the preceding three months, September through November 1982.

With respect to the first comparisons, the Maryland statistics indicated that while alcohol related accidents in the county where roadblocks were imposed went down by 10%, the incidence of such accidents in the control county was reduced by 11%. In addition, the county in which roadblocks were implemented saw its

number of fatal accidents more than double, from 3 in the year before the pilot program to 8 during the period of the study. Meanwhile, the control county's fatal accident rate fell from 16 the previous year to 3 during the pilot program.

The comparison between the 3 months during which the pilot program was instituted and the preceding 3 months was similiarly unsupportive of any claim of deterrence derived from sobriety roadblocks. Alcohol related accidents in the county where roadblocks were used fell 16% from the previous 3 months. However, in the control county, alcohol related accidents fell by 12%. Similarly, the number of fatal accidents fell in the target county by 27%, while it fell 25% in the county where no roadblocks were conducted.

Ultimately, Lieutenant Cotton was forced to concede that the pilot study did not establish conclusively that roadblocks acted as a deterrent against drunk driving.

Another of Petitioners' witnesses was

Lieutenant William Slaughter of the Michigan State Police, who testified concerning the factors which an officer at a roadblock could consider in assessing whether an individual would be detained for further investigation. These factors include the presence of an odor of alcohol, the driver's manner of speaking, whether the driver's eyes were bloodshot, whether his or her face was flushed, the general appearance of the driver's clothing, and whether the driver's shirt was unbottoned. Any one of these factors would be enough to allow the roadblock officer to detain an individual for further investigation. Indeed, Lieutenant Slaughter indicated in his deposition that an officer who stops a vehicle at such a roadblock could detain the driver for any one of these reasons or, theoretically, for no reason whatsoever.

On July 24, 1986, the trial court issued a comprehensive opinion adjudicating that Petitioners' sobriety roadblock program violated rights guaranteed by both the United States and

Michigan Constitutions.

Petitioners appealed the trial court's judgment to the Michigan Court of Appeals. In a unanimous opinion dated August 1, 1988, the Court of Appeals affirmed the trial court's determination that the roadblocks violated Respondents' constitutional rights. The Michigan Supreme Court, on February 22, 1989, denied Petitioners' Application for Leave to Appeal.

ARGUMENT

I. BASED ON THE RECORD PRESENTED IN THIS CASE, THE CONCLUSION THAT SOBRIETY ROADBLOCKS CONSTITUTE A VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS PROPER.

Both the trial court and the Michigan Court of Appeals applied the Fourth Amendment standard developed by this Court in Brown v Texas, 443 U.S. 47 (1979):

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

Id. at 50-51 (citations omitted).

The balancing test described in Brown, supra, has been repeated in identical or similar language in various decisions of this Court. Skinner v Railway Labor Executive Assoc., ___ U.S. ___; 109 S.Ct. 1402, 1414 (1989); Delaware v Prouse, 440 U.S. 648, 654 (1979). Petitioners do not attack the test employed by the courts below. Instead, they contend only that the courts misapplied that balancing test to the facts presented at trial.

The Petitioners' assertion of error is, therefore, primarily premised on their disagreement with the factual conclusions reached below. However, a review of the record established at trial demonstrates that the courts below did not err in finding constitutional violations.

A. Gravity of the Public Concern.

Respondents did not bring this case in an attempt to minimize the danger posed by persons who drive while intoxicated, or to suggest

in any way that drunk driving is not a serious societal problem. The trial court found that, "...there is a grave and legitimate State interest in curbing drunk driving." (74a.) Respondents do not disagree with this conclusion.

B. The Degree to Which the Seizure Advances the Public Interest.

This element of the Fourth Amendment balancing test was the central focus of Respondents' case below. Respondents established at trial that sobriety roadblocks were ineffective in addressing the serious problem of drunk driving. After addressing the evidence on this point, the trial court agreed that sobriety roadblocks do not advance the public interest in combatting drunk driving.

Dr. Lawrence Ross, one of the foremost experts in the country on deterring drunk driving, testified that as a means of directly removing drunk drivers from the road through on-the-scene arrests, sobriety roadblocks are worthless. Dr. Ross' conclusions on this point

were completely supported by Petitioners' own witnesses. Colonel Hough and Inspector Fladseth of the Michigan State Police both acknowledged that implementation of the sobriety roadblocks could not be justified on the basis of the limited number of arrests made during the stops. The statistical evidence provided at trial also demonstrated the complete ineffectiveness of roadblocks as an arrest tool. Based on this evidence, the trial court properly found that "sobriety checkpoints have not been shown to be an effective means for apprehending drunk drivers." (83a.)

Petitioners claimed, however, that sobriety roadblocks, while resulting in few arrests, might nonetheless indirectly reduce the incidence of drunk driving by acting as a deterrent. As the trial court found, Petitioners' deterrence argument was also unsupportable.

Dr. Ross testified that any program developed to combat drunk driving which raises public consciousness on this problem and holds

out the prospect of increased risk of detection could have a short term positive effect on drunk driving statistics. However, the long term effect of any drunk driving program must be based on public recognition of the fact that the program enhances the prospect of arrest for drunk driving. In Dr. Ross' terms, the driving public is subject to a learning curve -- once it learns that the prospect of being punished for drunk driving is not as great as it was led to believe, any deterrent effect ends.

Dr. Ross also noted that the Michigan sobriety roadblock program could have the opposite effect from that intended by its proponents. As Colonel Hough testified, only one sobriety roadblock would be in operation on any given night, and the county in which the roadblock was to be set up would be announced in advance and given extensive publicity. Dr. Ross noted that such a program would be no threat whatsoever to an individual outside the targeted county, and he further suggested that the

resulting program could be counterproductive in suggesting to drivers outside the targeted county that the chances of being detected for drunk driving were reduced because of the concentration of police resources elsewhere.

The significance of Dr. Ross' testimony was fully explored by the trial court, which made these critical factual findings:

> [S]obriety checkpoints cannot be expected to achieve any significant level of apprehending drunk drivers. This finding, in the Court's opinion, essentially undermines the whole theoretical basis for concluding that checkpoints can be effective in deterring drunk drivers, (i.e., that the public would fear being arrested for drunk driving if sobriety checkpoints were implemented, and thus, would not engage in drunk driving). Once the public perceives the truth about the low chance of a drunk driver actually being apprehended in a sobriety checkpoint, it cannot be reasonably supposed that those who are inclined to drink and drive will perceive a sobriety checkpoint as a significant threat to their being arrested.

(App. 95a-96a.)

Petitioners cannot concede that sobriety roadblocks achieve few arrests and, at the same time, attempt to justify the imposition of

these intrusions on the basis of an amorphous deterrent effect. The number of arrests achieved through this program and its deterrent effect are, as the trial court found, inextricably linked.

In an attempt to counter this uncontradicted evidence, Petitioners initially relied on statistics derived from the State of Maryland's use of sobriety roadblocks to suggest a possible deterrent effect. Two representatives of the Michigan State Police, Colonel Hough and Lieutenant Slaughter, candidly acknowledged that they knew of no data from Maryland supporting the view that sobriety roadblocks act as a deterrent. Indeed, Lieutenant Cotton of the Maryland State Police ultimately acknowledged that the Maryland program has not conclusively established any deterrent effect associated with the use of sobriety roadblocks. The statistics derived from the only effort to compare the effects of the Maryland roadblock program on alcohol related accidents (see Respondents' Ap-

pendix A) demonstrated only that alcohol related accidents went down in the county where the roadblocks were instituted by 10%, while they were reduced by an even greater percentage in the county where no roadblocks were conducted. These same statistics indicated that fatal accidents rose in the county where checklanes were employed by 167%, while fatalities in the county where no checklanes were used fell by 70%.

The statistics presented were also addressed at length in the trial court's opinion. (App. 83a-92a.) Based on this analysis, the trial court concluded that the data "does not support the deterrent effects of checkpoints." (App. 92a.)

In addition to demonstrating that sobriety roadblocks are not effective in arresting or deterring drunk drivers, Plaintiffs also presented considerable evidence indicating that such roadblocks are, at best, simply unnecessary in the fight against drunk driving. The three county sheriffs who testified gave their

professional views that requiring 12 officers to be stationed at a specific location would be a less effective use of limited police resources than traditional roving patrols. This testimony was corroborated by witnesses from the Michigan State Police, who testified that State Police officers receive considerable training in detecting drunk drivers based on objective driving characteristics and are highly skillful in detecting drunk drivers.

After reviewing the entire record, the trial court concluded that sobriety roadblocks are neither an effective means of deterring drunk drivers, nor do they have any significant deterrent effect. (App. 101a-102a.)

The Michigan Court of Appeals affirmed these findings. Sitz v Department of State Police, 179 Mich. App. 433; 429 N.W.2d 180 (1988). That court stated that "the defendants' own evidence strongly suggests the finding of a causal relationship between actual arrests and deterrence value" Id. at 441; App. 15a-16a. The Court

of Appeals noted that the Guidelines on which the State Police roadblock program is premised provides that the primary objective of the roadblocks is to "increase the perception of 'risk of apprehension' in the minds of [drinking] drivers" Id. Since the evidence that sobriety roadblocks are not an effective means of achieving arrests was uncontradicted, Id. at 442; App. 17a, the Michigan Court of Appeals affirmed the trial court's determination that "sobriety checkpoints [are] not an effective means of combatting drunk driving." Id. at 443; App. 20a.

Both the trial court and the Michigan Court of Appeals, therefore, found that the second prong of the Brown, supra, analysis must be decided in favor of Plaintiffs. These findings were entirely correct.[2] Petitioners seriously

---

2 Petitioners' assert in their brief that the courts below erred in finding roadblocks unconstitutional on the ground that a less restrictive alternative existed. (Petitioners' Brief, pp. 30-32.) This is a serious distortion of the record below. Petitioners' own brief demonstrates this error in noting that the "principal" basis for the

misstate the conclusions rendered below in asserting that sobriety roadblocks were found by these courts to be "somewhat effective." (Petitioners' Brief, p. 24.) In actuality, the Michigan Court of Appeals held that the trial court was correct "in finding that sobriety checkpoints were not an effective means of combatting

---

(Cont'd.)

decisions below was that these checklanes simply were not effective. (Petitioners' Brief, p. 23.) The "less restrictive alternative" analysis was irrelevant to this determination. The trial court's consideration of alternative approaches to the drunk driving problem was nonetheless appropriate. Under the State Police program, roadblocks would be operated by officers who would otherwise be on roving patrols. The effectiveness of such patrols in detecting drunk drivers is, therefore, related to the overall effectiveness of roadblocks. If the use of such roadblocks requires the removal of officers from patrol duty -- a far better tool against drunk driving -- the "effectiveness" of such roadblocks in detecting drunk driving is correspondingly reduced. This approach to roadblock effectiveness is particularly evident in the testimony of the three sheriffs called as witnesses by Respondents. This is not a case in which a program has been declared unconstitutional simply because a "less drastic and equally effective means" of addressing the problem existed. Cf. Skinner, 109 S.Ct. at 1419, fn. 9.

drunk driving." (App. 20a.)

C. The Severity of the Interference with Individual Liberty.

There is no doubt that the stopping of vehicles at a sobriety roadblock constitutes an intrusion which is governed by the federal Constitution:

> The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of these Amendments, even though the purpose of the stop is limited and the resulting detention quite brief.

Delaware v Prouse, supra, at 653.

The final factor contained in the Brown standard requires an examination into the extent of the intrusion caused by sobriety roadblocks.[3] This determination has usually been

---

3 It is not altogether clear why analysis of this third component in the Brown balancing test is necessary in light of the fact that sobriety roadblocks are "not an effective means of combatting drunk driving." 170 Mich. App. at 443. Regardless of the gravity of the public concern presented by drunk drivers, it would appear impossible to justify the seizure of individuals in roadblocks

divided into two components, the objective and subjective nature of the intrusion. See, United States v Martinez-Fuerte, 428 U.S. 543 (1976).

Based on the short amount of time that each car is required to stop, the trial court concluded that the objective intrusion of a sobriety roadblock was minimal. (App. 104a.) However, this analysis of the original stop does not take into consideration all the factors relevant to a determination of the objective intru-

---

(Cont'd.)

when such a seizure in no way serves the public interest in combatting drunk driving. Cf. Almeida-Sanchez v United States, 413 U.S. 266, 273 (1973). Similarly, there would appear to be little need to examine the scope of the intrusion involved in a sobriety roadblock if, as the courts below found, this intrusion, no matter what its scope, simply does not effectively accomplish the asserted law enforcement goal of removing drunk drivers from the road. Petitioners contend that the courts below erred in giving "undue consideration" to the second prong of the Brown balancing test. (Petitioners' Brief, p. 23.) Respondents would suggest that if a constitutionally cognizable seizure designed to combat drunk driving proves totally ineffective for that purpose, no degree of public concern or minimization of the intrusion involved would save this procedure from constitutional challenge.

sion.

If the warrantless, suspicionless seizures of automobile occupants can be effectuated at a sobriety roadblock, several conclusions would appear to follow. Under the decisions of this Court, after effectuating a valid stop of an automobile, a police officer could compel the driver and passengers to get out of the car, Pennsylvania v Mimms, 434 U.S. 106, 111 (1977); once removed from the vehicle, the officer could conduct a pat-down search of the occupants if he notices a bulge in their clothing, Id. at 111-12; the officer could further require the driver to produce a license or other vehicle documents, Texas v Brown, 460 U.S. 730 (1983); should the driver open the car's glove compartment to produce the documents, the officer could shift his position to examine the contents of the glove compartment, Id.; and the officer could shine a flashlight into the passenger compartment of the car and visually inspect its contents and occupants, Id.

During cross-examination, Inspector Fladseth acknowledged that all of these actions would be constitutionally permissible if the original roadblock seizure is adjudged constitutional. He further acknowledged that there is a undeniable potential for police abuse in such a program.

There is another aspect of the roadblock program as designed in Michigan which has a clear impact on the determination of the scope of the objective intrusion. Petitioners have alluded to the fact that the roadblock concept removes discretion from the officer conducting the stop. (Petitioners' Brief, p. 7.) To some extent this is accurate. By requiring roadblock officers to stop all cars, the officers have no choice in selecting who will be stopped. However, as the evidence presented at trial indicated, t e critical determination of whether a driver is to be detained for additional investigation and testing is left totally to the discretion of the officer conducting the stop.

Colonel Hough testified that it was up to the checkpoint officer to determine who to detain further. Lieutenant Slaughter elaborated on this discretion. According to him, an officer making this decision could look to a number of factors. He could base his decision on a strong odor of alcohol in the car, the condition of the driver's clothing, and whether his shirt was completely buttoned. Lieutenant Slaughter further testified that any one of these factors could be enough to convince the roadblock officer to require further investigation of the driver. And, at his deposition, Lieutenant Slaughter was willing to acknowledge that a driver could be required to submit to further testing for no objective reason whatsoever.

Petitioners have sought support for their roadblock program by suggesting that the Guidelines drafted by the State Police remove any authority from the officers in the field. The Defendants' reliance on this fact is significantly undermined by the testimony given by

Colonel Hough and Lieutenant Slaughter. Additionally, the discretion vested in the field officers perhaps accounts for another disquieting statistic developing in the evaluations of such roadblock programs.

Petitioners announce in their brief that the May 1986 roadblock conducted in Saginaw County was "a successful operation." (Petitioners' Brief, p. 8.) This announcement comes without explanation for the limited number of arrests achieved in that roadblock, and without comparison of the number of arrests which may have been achieved if the 17 officers who took part in that operation had each spent three hours using traditional police methods. Putting these concerns aside, the record also shows that of the 126 drivers who passed through that roadblock, only two were detained for further questioning, and only one of these two was arrested. Thus, after being screened by the initial roadblock officer, as many drivers were released after being forced to undergo further examina-

tion and testing as were arrested for drunk driving. These additional, more serious intrusions into the privacy interests of innocent drivers have been documented in other statistical studies of sobriety roadblock operations.

Sobriety roadblocks involve not merely the inconvenience of being stopped for one minute or less. These roadblocks present a far more significant intrusion into the privacy interests of law abiding citizens. See generally, J. Jacobs & N. Stossen, "Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks," 18 U.C. Davis L.R., 595, 650-52 (1985). These additional concerns should be considered in assessing the objective intrusion.

However, both the trial court and the Michigan Court of Appeals held that the subjective nature of the roadblock intrusions was significant. After extensive analysis of both the record and relevant court opinions, the trial court concluded that, "the subjective intru-

sion on individual liberty interests which would be caused by the sobriety checkpoints was substantial." (App. 123a-124a.) The Court of Appeals held that there was sufficient evidence to support the trial court's conclusions on this point. (App. 22a.)

The roadblocks designed by the Michigan State Police are to be conducted at night. A driver approaching a checklane may well be traveling on a darkened, little traveled state highway when he/she is confronted by a sign indicating a sobriety roadblock. Approximately a quarter of a mile later, that driver would discover a large area illuminated by four halogen lights, containing at least 12 police officers, numerous police cars, and other support vehicles. Nevertheless, fear and anxiety would be understandable reactions for a person innocently driving on a quiet public highway who emerges into a brilliantly lighted scene containing at least a dozen police officers and assorted roadblock activities. As the court observed in State v

Smith, 674 P.2d 562 (OK Crim. App. 1984):

> The roadblocks in the present case could well act, and most likely did act, as a total surprise to those passing through. The fear factor involved in this case is heightened by the presence of at least 10 officers, chemical testing equipment, and mobile booking and jail vans actually on the scene. To the individual approaching such a roadblock, it is not unlikely that he would reasonably perceive the officers as being desireous of arresting criminals, and that anyone passing through could easily be arrested.

Id. at 564.

Unlike the roadblocks construed in Martinez-Fuerte, supra, the roadblocks involved in this case are not fixed, but will instead be moved to different locations. And, far from premising their program on the minimization of surprise to the driver, the "effectiveness" of sobriety checklanes (such as it is) is absolutely premised on surprise. As Lieutanant Cotton testified, to obtain any arrest whatsoever through this mechanism, it is essential that the driving public not be aware of the precise location of the roadblocks.

The Michigan courts, therefore, employ-

ed the balancing test prescribed by this Court in concluding that the sobriety roadblocks proposed by Petitioners were unconstitutional. The decisions rendered below were entirely supported by the factual record and appropriate under this Court's decisions.

Petitioners have cited to this Court's recent decisions regarding drug and alcohol testing, Skinner, supra, and National Treasury Employees Union v Von Raab, ___ U.S. ___; 109 S.Ct. 1384 (1989). Contrary to Petitioners' position, these two decisions reinforce the finding that sobriety roadblocks are unconstitutional under Fourth Amendment analysis. In Von Raab, this Court discussed the operation of the Fourth Amendment balancing test as follows:

> While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, our decision in Railway Labor Executives reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. As we note in Railway Labor Executives, our cases

> establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

109 S.Ct. at 1390 (citations omitted; emphasis added).

In Von Raab, this Court found that the Custom Service's drug testing program "is not designed to serve the ordinary needs of law enforcement," 109 S.Ct. at 1390, and proceeded to apply a balancing test. In Skinner, the Government's interest in regulating the conduct of railroad employees to ensure safety presented "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." 109 S.Ct. at 1414.

Sobriety roadblocks, by comparison, are instituted to remove drunk drivers from the road through the enforcement of applicable criminal laws. There can be no justification for such

roadblocks "beyond the normal need for law enforcement" of state laws proscribing drunk driving. Von Raab, 109 S.Ct. at 1390.

Von Raab and Skinner indicate that a seizure conducted for the sole purpose of enforcing a state's criminal laws which is not based upon probable cause or reasonable suspicion of any kind is unreasonable under the Fourth Amendment. These cases suggest that the balancing test employed by the courts in this case was not even necessary to the determination that sobriety roadblocks violate rights secured by the Fourth Amendment.

II. THE MICHIGAN CONSTITUTION CONSTITUTES AN ADEQUATE AND INDEPENDENT STATE GROUND PRECLUDING REVIEW BY THIS COURT.

The decision rendered by the courts below should not be reviewed by this Court since the Michigan Constitution constitutes an independent and adequate basis for the decision determining sobriety roadblocks to be unconstitutional.

Petitioners assert that this case is

governed by Michigan v Long, 463 U.S. 1032 (1983). In this case, unlike Long, a court has expressly determined that sobriety roadblocks are unreasonable under the Michigan Constitution. The trial court gave separate consideration to the Michigan Constitution's application to roadblocks. (App. 124a-131a.) Citing exclusively Michigan cases construing the state Constitution, the trial court found that the Michigan Constitution required "at least an individualized articulable suspicion that some criminal wrongdoing had or was about to occur." (App. 130a.)

There is no doubt that the trial court's decision was independently premised on the Michigan Constitution under Long, supra. Furthermore, the trial court's determination under the Michigan Constitution was not disturbed by the Michigan Court of Appeals. (App. 24a-25a.) Under such circumstances, the finding with respect to the Michigan Constitution provides an independent basis for the finding of unconstitu-

tionality.

CONCLUSION

A somewhat lengthy analysis of the factual record has been included in this Brief to demonstrate that the central dispute in this case revolves around the factual conclusions arrived at by the trial court, not the appropriate legal test under the Fourth Amendment. These predominently factual disputes make this a particularly inappropriate case for review by this Court.

The courts below properly concluded on the basis of the factual record developed at trial that sobriety roadblocks violated the Fourth Amendment of the United States Constitution. For the foregoing reasons, the Petition for Writ of Certiorari to the Michigan Court of Appeals should be denied.

Respectfully submitted,

MARK GRANZOTTO
Counsel of Record
One Kennedy Square, #2204
Detroit, Michigan 48226
(313) 964-4720

DEBORAH L. GORDON
Attorney for Respondents
1600 Ford Building
Detroit, Michigan 48226
(313) 962-3784

WILLIAM C. GAGE
Attorney for Respondents
1818 Buhl Building
Detroit, Michigan 48226
(313) 963-8890

Dated: June 27, 1989

****
APPENDIX
****

APPENDIX

TABLE OF CONTENTS

	Page
Statistics Compiled by Maryland State Police During Three Month Pilot Program: December 1982-February 1983. . .	1a
I. Comparison of Driving Statistics During Pilot Program and Driving Statistics During Previous Year. .	1a
II. Comparison of Driving Statistics During Pilot Program and Preceding Three Months	1a

STATISTICS COMPILED BY MARYLAND STATE POLICE DURING THREE MONTH PILOT PROGRAM: DECEMBER, 1982 - FEBRUARY, 1983

	HARFORD COUNTY (Target County Where Roadblocks Employed)		FREDERICK COUNTY (Control County Where No Roadblocks Employed)	
I. COMPARISON OF DRIVING STATISTICS DURING PILOT PROGRAM AND DRIVING STATISTICS DURING PREVIOUS YEAR				
	Dec. 1981-Feb. 1982	Dec. 1982-Feb. 1983 Test Period	Dec. 1981-Feb. 1982	Dec. 1982-Feb. 1983 Test Period
Alcohol Related Accidents	133	120	108	96
% Decrease		-10%		-11%
Fatal Accidents	3	8	10	3
% Difference in Fatal Accidents		+167%		-70%
II. COMPARISON OF DRIVING STATISTICS DURING PILOT PROGRAM AND PRECEDING THREE MONTHS				
	Sept.-Nov. 1982	Dec. 1982-Feb. 1983	Sept.-Nov. 1982	Dec. 1982-Feb. 1983
Alcohol Related Accidents	144	120	109	96
% Difference in Alcohol Related Accidents		-17%		-12%
Fatal Accidents	11	8	4	3
%Decrease		-27%		-25%

Supreme Court, U.S.
FILED
JUN 17 1989
JOSEPH F. SPANIOL JR.
CLERK

(2)

No. 88-1897

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

---

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Respondents.

BRIEF OF AMICUS CURIAE, MADD IN MICHIGAN, IN FAVOR OF PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

FRANK J. KELLEY
ATTORNEY GENERAL

LOUIS J. CARUSO
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assitant Solicitor General

PATRICK J. O'BRIEN
Assistant Attorney General
Attorneys for Petitioners

MICHAEL B. RIZIK, JR.
MANSOUR, RIZIK, RIZIK AND ZINTSMASTER, P.C.
Attorney for MADD in Michigan
1000 Beach Street
Flint, Michigan 48502
(313) 233-0484

31 pp

TABLE OF CONTENTS

	PAGE
INDEX OF AUTHORITIES.....	ii
STATEMENT OF INTEREST.....	1
ARGUMENT.....	3
CONCLUSION.....	27

INDEX OF AUTHORITIES

PAGE

Articles

"National Accident Sampling System" 1986 - National Highway Traffic Safety Administration 4,5,6

"Alcohol Involvement In Fatal Traffic Crashes 1986" - U.S. Department of Transportation/National Highway Traffic Safety Administration 6,7

"Drunk Driving Facts" - National Center for Statistics and Analysis - U.S. Department of Transportation/National Highway Traffic Safety Administration..... 8

"1987 Michigan Drunk Driving Audit Report" 9

"The Influence of Alcohol: Counter Measures In Changing Drink Driving Attitudes", Asia-Pacific Journal of Public Health; Vol 1, No. 1; January, 1987..... 18,19,21

AMICUS CURIAE BRIEF BY
MOTHERS AGAINST DRUNK DRIVING (MADD)
IN MICHIGAN IN SUPPORT OF
PETITIONERS' JURISDICTIONAL STATEMENT

MADD in Michigan, with the consent of all parties involved, files the following Amicus Curiae Brief in favor of the Petition for Writ of Certiorari to the Michigan Court of Appeals.

STATEMENT OF INTEREST

MADD in Michigan incorporates by reference the Michigan Attorney General's legal arguments. The purpose of this Amicus Curiae Brief expands MADD in Michigan's traditional role of victims' assistance. By doing this, MADD's constituency truly becomes each and every citizen, because we wish to prevent the tragedy that drunk driving threatens to each of us. By allowing MADD in Michigan to file an Amicus Curiae Brief, and later

orally argue the merits, this Honored Court implicitly recognizes this group's aims.

Mothers Against Drunk Driving (MADD) was founded in May, 1980 to assist the victims of drunk driving. Almost immediately, it became clear that "victim assistance" meant more than providing counseling to drunk driving automobile crash survivors. It also meant "preventive medicine". It later became clear that one method of preventing drinking and driving was to encourage stricter sentencing as a future deterrent. Further, MADD supports stricter and more creative law enforcement, e.g. Sobriety Checkpoint programs.

MADD in Michigan does not presume to be so arrogant that it believes this

Supreme Court is not aware of the consequences of drinking and driving. However, in this Amicus Curiae Brief, we wish to present in the starkest statistical terms the magnitude of the drinking and driving problem facing our communities, the State of Michigan and the United States. This organization hopes that after the parties present their arguments, this Court will decide in favor of victims and potential victims, and against drunk driving.

ARGUMENT

I. STATISTICS FROM THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (NHTSA)

The most comprehensive traffic accident statistics which NHTSA has provided centers on 1986. In that year, there were 6,390,000 automobile crashes - approximately nine (9%) percent, or

594,000, involved alcohol. In those smashups, 432,000 persons sustained minor injuries, 70,000 persons received moderate injuries, and another 52,000 received serious or greater injuries. (National Accident Sampling System, 1986).

Alcohol was involved in a greater proportion of nighttime crashes (i.e. 6:00 P.M. to 6:00 A.M.) than daytime crashes, and to a greater extent in weekend crashes than weekday crashes. During the weekend-nighttime period, alcohol was involved in nearly one of four automobile crashes (National Accident Sampling System 1986).

Drivers with suspended or revoked licenses and drivers with no licenses were five times as likely to have been drinking (25% and 23%, respectively) as were drivers with valid licenses (5%). Drivers

whose licenses had expired were alcohol involved 13% of the time (National Accident Sampling System 1986).

Drivers with previous convictions for driving while intoxicated (DWI) reveal fearsome numbers. Those whose record contained more previous DWI convictions were much more likely to have been drinking and involved in an auto crash than were drivers with fewer previous DWI convictions. Those with one previous DWI conviction were involved in 41% of alcohol related smashups, and those with two or more prior DWI convictions were involved in 35% of the alcohol related crashes. However, those with no previous DWI convictions were involved only five (5%) percent of the time in alcohol related crashes. The common threads in these statistics are alcohol consumption and

driving, previous run-ins with the law, and the continued, unabated threat these drivers pose to society's security. (National Accident Sampling System 1986).

Next, statistics clearly show that far too many automobile crashes take place after one car's driver had been drinking and registered a blood alcohol content (BAC) greater than .10%, the presumptive level of intoxication in Michigan.

The real tragedy of drinking and driving is the personal injury and fatality rates. According to NHTSA, traffic crashes killed 46,056 people in 1986 (Alcohol Involvement In Fatal Traffic Crashed, 1986). Forty one (41%) percent, or about 18,929, of these fatalities, occurred in crashes in which a driver or non-occupant was drunk. Additionally, 11%, or 5,112, of these fatalities

involved a driver or non-occupant who had been drinking, but whose BAC was below .10%, the presumptive level of legal intoxication in most states. (Alcohol Involvement In Fatal Traffic Crashes, 1986).

Of the 60,297 drivers involved in fatal crashes in 1986, 8.5% fell in the .01-.09% BAC group, and 25.7% were at or above the .10% BAC, the presumptive level of legal intoxication in Michigan and most other states. Similarly, of the 7,775 fatally injured non-occupants, 6.9% fell in the .01-.09% group, and 28.9% were at or above the .10% BAC (Alcohol Involvement In Fatal Traffic Crashes, 1986). These figures are significant because they show that <u>drivers who survive a fatal crash are much less frequently drunk than are fatally injured drivers</u>. This seems to be

the case of other statistics reported thus far: The less alcohol, the less likely there will be an injury or fatality. Further, fatally injured drivers show higher alcohol levels than surviving drivers in all types of crashes and time periods.

Traffic crashes are the greatest single cause of death for people between the ages of 5 and 34, and more than half of these fatalities are alcohol related (Drunk Driving Facts). Close to 26% of all drivers in fatal crashes were drunk at the time of the crash (Drunk Driving Facts). It should be clear that these statistics present a grim picture of safety on our highways. More needs to be done. Sobriety Checkpoints are yet another method of getting the drunk driver off the road with a minimum amount of

inconvenience. It is another piece in the complicated puzzle of trying to solve the drunk driving problem.

II. STATISTICS FOR MICHIGAN

The Michigan Department of State Police in its "1987 Michigan Drunk Driving Audit Report" particularizes the above statistics for the State of Michigan. They have compiled the following for the State of Michigan between January 1 and September 30, 1987:

1. The total population in the State of Michigan was 9,170,000.
2. The total number of people operating under the influence of liquor (OUIL) and driving while impaired (DWI) was 63,966.
3. There were 76,079 personal injury accidents accounting for

112,325 persons injured. Of these, there were 11,941 personal injury accidents accounting for 18,790 persons injured where alcohol was involved. For this time period, that is a total of 13.02 personal injury accidents per 10,000 population, accounting for 20.49 persons injured per 10,000 population in drinking and driving smashups.

4. For the same time period, there were 1,040 fatal crashes accounting for 1,158 people killed. Of these, 492 fatal crashes accounted for 566 persons killed where alcohol was involved. This means that per 10,000 population, there were .54 fatal crashes and .62 persons killed where drinking and driving were involved.

5. There were 10.15 personal injury accidents accounting for 15.98 persons injured per 100 miles of road in Michigan. Michigan has over 117,597 miles of roads. This also means there were .42 fatal accidents for 100 miles of road accounting for .48 people killed where drinking and driving were involved.

In Wayne County, where Detroit is located, with a population of a little

over 2.2 million people, there were 18,420 personal injury accidents injuring 27,095 people. Of these, there were 2,336 personal injury accidents injuring 3,767 people where drinking and driving were involved. This means there were 33.42 personal injury accidents and 53.89 persons injured per 100 miles of road in Wayne County, and 10.54 personal injury accidents accounting for 17 people injured per 10,000 population.

Also, for this nine month period in 1987, in Wayne County there were 159 fatal accidents killing 171 people. Per 100 miles of road, this was 1.07 fatal accidents, killing 1.17 people where drinking and driving was involved. Per 10,000 population, this is .34 fatal accidents and .37 persons killed. However, there were only 11,607 arrests

during that same time period for OUIL and DWI. There were still another approximately 3,000 people who had been drinking and driving that escaped law enforcement attempts at curbing the serious problem, which means that approximately 25% of the total number on drinking and driving personal injury accidents, fatal accidents, and arrests went undetected until someone was hurt. While it is admirable that the police caught 75% of this figure, it is of little consolation to the victims and their families that another 25% escaped detection.

The Wayne County Circuit Court and Court of Appeals found as fact that the sobriety checkpoints were only effective in detecting 1% of the people who had been drinking and driving at any one

point. Therefore, of the almost 3,000 personal injury and fatal smashups in Wayne County, approximately 30 of these crashes could have been avoided had the appropriate sobriety checkpoint been in place before the accident occurred. Also, of the little more than 4,000 persons injured and killed, approximately 40 could have been saved. While these numbers may appear small to the objective eye, to the victims these numbers are indeed large. Almost nine people could still be alive today if the sobriety checkpoints had been in place.

A common misunderstanding is that the rate of alcohol related crashes is greater in a metropolitan area than the quiet serenity of the rural area known affectionately as "up north" in Michigan. In fact, of the five counties

with the most distressing statistics (Baraga, Crawford, Leelanau, Mackinac, Ogemaw, and Van Buren) two are among the most picturesque, i.e., Leelanau and Mackinac Counties. For the first nine months of 1987, Mackinac registered a population of approximately 10,100 people. There were 89 personal injury accidents accounting for 127 persons injured. There were 14 personal injury accidents accounting for 20 persons injured where drinking and driving were involved. This means that per 10,000 population, there were almost 14 personal injury accidents accounting for almost 20 persons injured where drinking and driving were involved.

Also, in the same county, there were three fatal accidents killing three people. Two of the three fatal

accidents, killing two people, involved drinking and driving. A clear 67%, therefore, of all fatal accidents in Mackinac County during this time period involved drinking and driving. More alarming is the fact that approximately two people per 10,000 population were involved in a drinking and driving fatal crash killing approximately two people.

It is safer, from a drinking and driving perspective, to live in Wayne County than it is in Mackinac County, because the chance of being killed in a drinking and driving related crash is vastly greater in Mackinac County than in the latter. If you apply the same rate of fatal crashes to Wayne County that are found in Mackinac County, 440 people would have been killed in Wayne County during the first nine months of 1987

rather than 82 actually reported. If such were the case, the cry for tougher legislation and law enforcement to rid the roads of drunk drivers would compare with the media's and law enforcement's urgent talk about the number of teenagers killed by handguns in Detroit, and the overall murder rate there.

This Supreme Court will recall that in the tragic Northwest Airlines Flight #255 crash which occurred on August 16, 1987 at Detroit's Metropolitan Airport, 156 people died, making it the second worst air crash in our nation's history. Imposing the Mackinac County rate of fatal drunk driving auto crashes on Wayne County, which would result in 440 people killed, would mean approximately 2.82 airline crashes in one location for the nine month period in question. Recalling

the emotional effect Northwest Flight #255 left on each of us, imagine our sense of rage and sorrow if almost three Northwest Airlines Flight #255s occurred in a nine month period in Wayne County or any other metropolitan area. Again, these statistics scream for more tools which law enforcement requires to reduce the number of drinking drivers on the road. Give Michigan's police the tools to fix the problem! Give them the sobriety checkpoints!

III. THE AUSTRALIAN EXPERIENCE

The Australian drinking and driving experience is similar to that of the United States. There, alcohol abuse was the single most important factor contributing to road crash deaths and

injuries "where solid drinking by the majority of the community is normal behavior" ("The Influence of Alcohol..."). Australia has developed a drinking and driving control package including a blood alcohol legal limit of .05g%, compulsory blood alcohol testing of casualties, random breath testing (i.e. sobriety checkpoints) and heavy penalties. The major difference between the Australian measures and those in the United States seems to be the fact that they have sobriety checkpoints which some states in the United States have declared unconstitutional or do not have in effect. Another difference, is that presumptive intoxication in the State of Michigan, and in most other states, is .10g%, while in Australia, it is .05g%.

It is interesting to note that Australia has adopted drunk driving countermeasures similar to those that Surgeon General Dr. C. Everett Koop recently recommended. Dr. Koop came out in favor of reducing the drunk driving BAC level of legal intoxication to .04g%, compulsory BAC testing for all drivers involved in fatal and serious injury traffic collisions and, relevant to this Amicus Curiae Brief, sobriety checkpoints. Given the opportunity to file an Amicus Curiae Brief on the merits, MADD in Michigan will go into Dr. Koop's recommendations further.

In any event, the Asia-Pacific Journal of Public Health, volume 1, number 1, of January, 1987 states that Australia's drunk driving countermeasures have been effective in reducing the

national percentage of drivers and riders killed with an illegal blood alcohol concentration from the 44% in 1981 to 36% in 1984. Between 1970 and 1984, there was a decreased fatality rate per 10,000 registered vehicles from 8.5 to 2.9 where alcohol was involved. In the State of Victoria, there was a fall in alcohol effected casualties from 39% in 1977 to 25% in 1984.

One of the measures instituted in Australia and credited with changing drinking and driving behavior is random breath testing (RBT), otherwise known as sobriety checkpoints in the U.S. In the Asia-Pacific Journal of Public Health at page 45, it stated regarding RBT:

> "The effectiveness of RBT is linked with the intensity of its application. Its high deterrent effect has played a significant

role in shifting community attitudes towards drunk driving. There is fear of detection and the consequences. RBT enables police to screen breath tests without having a reason but any long term effect is dependent on maintaining a high level of continued visible police enforcement backed up by publicity. The value deterrence has been demonstrated in New South Wales where testing has been a high one in three. Following introduction of RBT in 1982, there was an 18-20% reduction in fatalities, and there was a fall in the percentage of fatally injured drivers and riders with illegal BACs from 41% in 1981 to 33% in 1985. An intensive RBT blitz in Victoria carried out over a seven-week period in 1978 and backed with high publicity resulted in a 24% reduction in night time serious casualty crashes in the areas blitzed. The cost benefit of RBT is significant - in the first three years of operation in New South Wales, there was an estimated savings of eight million dollars.

Since RBT was introduced in Victoria, the percentage of motorists exceeding 0.05g% when tested a Preliminary Breath Testing Stations has fallen from 2.2% in 1976 to 0.7% in 1985. However, the number tested in

> Victoria needs to be more than double to approach the rates achieved in New South Wales and Tasmania."

IV. SIGNIFICANCE OF FEDERAL AND STATE STATISTICS AND THE AUSTRALIAN EXPERIENCE

MADD in Michigan believes that the best way to reduce drinking and driving is increased, sustained public awareness. MADD in Michigan engages in virtual continual promotion of the message: Don't drink and drive! In early Fall each year, MADD co-sponsors the "Drive for Life" campaign. Each American is asked not to drink and drive on a designated day.

During the Christmas holidays, MADD asks each person to "Tie One On" for safety, by attaching a red ribbon to each car's antenna or door handle. After Christmas is a candlelight vigil commemorating those who have died because

of the drunk driver. In 1988, in Genesee County, Michigan alone, the SADD (Students Against Drunk Driving) and MADD chapters cut and distributed 100,000 red ribbons. The county's population is only 440,000.

However, these projects could become meaningless without our government's institutional backing. Without the force of law throwing its full and heavy weight behind these efforts, these projects could become exercises in futility and frustration. They could be viewed as spineless, public relations tricks. They would remain pep rallies without the big game ever being played -- and drunk driving will continue.

Sobriety checkpoints not only yank the drunk driver off the road, but serve notice to all those who could pass

through not to drink and drive. If a checkpoint can be set up at anytime having maximum effect, the potential drunk driver faces the possibility of being detected and hauled-in before he or she does damage. The more this happens, the less likely the drunk driver will want to chance being caught.

The Wayne County Circuit Court and Michigan Court of Appeals held the sobriety checkpoints unconstitutional because there was potential, subjective fear and surprise. But, who really will be fearful and surprised? Certainly, a teetotaller will not be afraid or surprised, because there is absolutely nothing to be concerned about. Does the honest citizen have to be concerned about an IRS audit? Does an electrician have to be concerned about fatal shock if the electricity is disconnected?

On the other extreme is the very drunk driver. If he is so drunk that he attempts to run a checkpoint, then he will suffer no fear or surprise - or any other appropriate emotion. Obviously, this person must be removed from the roads, and these checkpoints would effectuate this purpose.

The only one who may suffer fear and surprise is the auto driver who's been drinking - he may seek to escape the checkpoint. If that occurs, then strategically placed State Police Troopers will apprehend and arrest those who attempt to get away. Under such circumstances, there will be the necessary "probable cause" to do an alcohol test and arrest the drunk driver.

Further, the drunk driver, who's so bold and irrational that he or she

attempts to run the checkpoint, is the one the program is set up to catch. If someone attempts to run the checkpoint, it is obvious that probable cause exists for a search and seizure, and arrest.

Checkpoints will not only help rid the roads of another menace, but prevent and deter future crashes. When combined with legislation taxing the drunk driver with costs of the checkpoint, the offender is criminally and financially responsible for his or her actions. The Australian experience shows that if the government pulls out all stops, the drunk driver can be removed from the road. As the number of drunk drivers decreases the number of drunk driving crashes, injuries and fatalities likewise will decrease. The results would justify the minimal inconvenience to those stopped for a few seconds, and lives will be saved.

Finally, isn't it interesting that checkpoints to catch so-called illegal immigrants are legal, but to catch illegal drunks are not in Michigan? The immigrant has come to this country for the freedom and opportunity it offers, and to contribute to its wealth. The drunk driver destroys others' freedom and opportunity, and depletes our primary national treasure -- our people.

CONCLUSION

Drunk driving is totally controllable. If effectively controlled, almost 3/4 of all fatalities in auto crashes would never happen. Billions of dollars each year would be saved. The spillover into other areas of our

national consciousness is bound to enhance our quality of life.

MADD in Michigan asks this Honored Court to grant the following relief:

A) Grant the Petition for Certiorari so that we may commence a national debate not only on this checkpoint issue, but the whole drunk driving problem.

B) Reverse the Michigan Courts' rulings, and hold the Sobriety Checkpoint in Michigan as constitutional.

C) Allow counsel for MADD in Michigan to argue orally whenever possible during these proceedings' pendency. Give us the tool to reach the American people through its most time honored way -- our judicial system.

MANSOUR, RIZIK, RIZIK
AND ZINTSMASTER, P.C.
Michael B. Rizik, Jr.
Attorney for MADD in
Michigan
1000 Beach Street
Flint, Michigan 48502
(313) 233-0484

Supreme Court, U.S.
FILED
JUN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1897

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW AND JACK WELBORN,

Respondents.

~~MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE~~

ROGER L. CONNER
Counsel of Record
JOHN ROELS
GEOFF GILLIS
WHEELER, UPHAM, BRYANT & UHL, P.C.
11th Floor, Trust Building
Grand Rapids, MI 49503
(616) 459-4634.
Counsel for Movants

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

Movants American Alliance for Rights and Responsibilities, Inc. and Remove Intoxicated Drivers, Inc., hereby respectfully move for leave to file the attached brief *amici curiae* in this case. Both counsel for the petitioners and for the respondents have consented to the filing of this brief.

The interest of the movants in this case arises from their efforts to stop drunken driving. In those efforts, they attempt to determine which law enforcement activities are both effective and constitutional. Both organizations have proposed traffic sobriety checkpoints as constitutional and effective methods of reducing the incidence of drunken driving. This Court's determination of the constitutionality of traffic sobriety checkpoints will have a substantial effect on both organization's future activities.

Movants believe that the Petition for Certiorari omits several factors within Movants' unique experiences which may aid the Court in determining whether to grant the Petition.

Respectfully submitted,

ROGER L. CONNER
Counsel of Record
JOHN ROELS
GEOFF GILLIS
WHEELER, UPHAM, BRYANT & UHL, P.C.
11th Floor, Trust Building
Grand Rapids, MI 49503
(616) 459-4634.
Counsel for Movants

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW AND JACK WELBORN,

Respondents.

PROPOSED BRIEF AMICI CURIAE

ROGER L. CONNER
Counsel of Record
JOHN ROELS
GEOFF GILLIS
WHEELER, UPHAM, BRYANT & UHL, P.C.
11th Floor, Trust Building
Grand Rapids, MI 49503
(616) 459-4634.
Counsel for Movants

TABLE OF CONTENTS

Table of Authorities ii

Interest of Amici 1

Statement of Context 2

Additional Reasons for Granting the Writ 6

I. The Constitutionality of Traffic Sobriety Checkpoints Presents An Important Question of Federal Law As to Which Local Governments Are in Doubt and Which Should be Clarified by This Court 6

II. The Decision of the Michigan Court Ignores This Court's Balancing Test 8

III. This is an Appropriate Case for Review 9

Conclusion 10

TABLE OF AUTHORITIES

CASES

Delaware v. Prouse, 440 U.S. 648 (1979) 6,7,8

Little v Maryland, 479 A.2d 903 (Md. 1984) 7,8

U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976) 7

STATUTES AND REGULATIONS

U.S.CONST. amend IV 6,7,9,10

OTHER

American Automobile Association, 1990 Policy Book: Driving Under the Influence of Alcohol and Other Drugs (1990) 4

MADD, Impaired Driving Issues Compendium; a Grassroots Call to Action (1989) 4

National Commission Against Drunk Driving, Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving (December 1987) . . . . . passim

National Safety Council, Committee on Alcohol and Other Drugs, Enforcement of Law Aimed at Alcohol-Impaired Driving (October 12, 1986) 4

Presidential Commission on Drunk Driving, Final Report (November 1983) 4,5

United States Department of Health and Human Services, Surgeon General's Workshop on Drunk Driving, Proceedings (December 14-16, 1988) . . 2,5,8

United States Public Health Service, Statement of C. Everett Koop for Press Conference (May 31, 1989) 2,5

Robert B. Voas, Eugene Rhodin, and Cheryl Lynn, Evaluation of Charlottesville Checkpoint Operations, National Highway Traffic Safety Administration DOT HS 806989 (May 1985) 5

INTEREST OF AMICUS

Amicus American Alliance for Rights and Responsibilities (Alliance) is a District of Columbia non-profit corporation, which supports a healthy balance between individual rights and civic responsibilities. The incidence of drunk driving on American roads is a leading example of the pursuit of individual wants without regard to the consequences for others or for the society as a whole. Therefore the Alliance works to support the efforts of citizens' groups, voluntary associations, and government agencies to reduce drunk driving.

Remove Intoxicated Drivers, Inc. (RID-USA), is the oldest anti-"driving while intoxicated" ("DWI") national organization in the Nation and has 136 chapters operating in 36 states. RID-USA's goals are to deter drunken driving, help DWI victims, educate the public to demand a Sane National Alcohol Policy, and monitor and evaluate the laws and programs put into place to deter drunken driving.

The interest of the Alliance and RID-USA in proposing that this Court issue a writ of certiorari is different than that of the Attorney General of Michigan. As organizations involved with this issue nationwide, Amici advocate traffic sobriety checkpoints as part of a coordinated, multi-faceted effort to reduce drunk driving. The experience of RID-USA, in particular, is that adverse state court decisions, including the instant case, are confusing law enforcement officials nationwide, especially at the local level where decisions are frequently made to avoid litigation rather than risk expensive test cases in unsettled areas of the law.

Amici are adversely affected by the lower court's decision and therefore have an interest in supporting this petition for writ of certiorari in this case.

STATEMENT OF CONTEXT

A. Drunk Driving is an urgent national problem.

On May 31, 1989, the Surgeon General of the United States, Dr. C. Everett Koop, released the Proceedings of the Surgeon General's Workshop on Drunk Driving. Surgeon General's Workshop on Drunk Driving, *Proceedings*, December 14-16, 1988 (hereinafter *Proceedings*). Just as it was the Surgeon General who called the country's attention to the health effects of smoking in 1964, in 1989 it is the Surgeon General who calls for a national campaign on drunk driving. "It appears to me that we may now be — in terms of alcohol and drunk driving — where we were 25 years ago in terms of tobacco." *Proceedings*, at 7.

In his findings, issued in a separate statement, Surgeon General Koop declared:

> Nearly 24,000 people lost their lives in alcohol-related traffic crashes last year, an average of one alcohol related fatality every 22 minutes. An additional 534,000 people suffer injuries in alcohol-related crashes every year, an average of one every minute.

United States Public Health Service, Statement of C. Everett Koop, Press Conference announcing the release of the Proceedings of the Surgeon General's Workshops on Drunk Driving, May 31, 1989, P. 1.

According to the National Highway Traffic Safety Administration's Federal Accident Reporting System, slightly more than half of all motor vehicle fatalities in this country are alcohol-related. National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving*, December 1987 (hereinafter National Commission Report) at 6.

The trial court concluded that a similar percentage applies in Michigan. Appendix to Petition for Writ of Certiorari (hereinafter "App."), at 73a. The advisory committee which developed the guidelines for the Michigan Sobriety Checkpoint program cited the following statistics:

> Michigan 1984 alcohol-related traffic crash statistics reveal that 800 persons died, 28,681 suffered personal injury with a total economic cost of $351,959,000.

Id.

Both the Michigan trial court and the Michigan Court of Appeals recognized "there is a grave and legitimate State interest in curbing drunk driving." App. at 74a, 13a.

B. Sobriety Checkpoints Are An Important Part of a National Strategy to Reduce Drunk Driving.

Around the United States, civic groups and voluntary associations have joined together with educators, local and state government agencies, law enforcement officials, and the appropriate federal agencies to find answers to this national tragedy. National Commission Report, at 5. After decades of effort, it is evident that there is no "silver bullet"; no single method to curb drunk driving. The attitudes and behavior of intoxicated drivers have proven remarkably resistant to change. *Id.*

The consensus of these groups is that progress can be made only with a multi-faceted approach, no single

part of which can be proven in advance to be the solution, but all of which together may reduce the carnage on our highways. "A systems approach . . . is required . . . to prevent death and injuries resulting from drunk driving." *Id.* Options include removal of drivers licenses, rallies, public service announcements to raise public consciousness, free cab rides home from bars, imprisonment, and more. Presidential Commission on Drunk Driving, *Final Report*, November 1983, (hereinafter Presidential Commission Report) at 4-23. That the task force convened by the Governor of Michigan should recommend a 35-point plan of action, Brief of Petitioner, at 1, is typical of the broad approach being developed by state and local governments in response to concerned citizens.

One portion of this national consensus is that sobriety checkpoints are an important part of the overall strategy. Citizens' organizations such as Amicus RID-USA, Mothers Against Drunk Driving,[1] and the National Safety Council,[2] have each made the institution of sobriety checkpoints a priority in their nationwide advocacy efforts. Insurers such as the American Automobile Association[3] support these groups.

1 MADD, *Impaired Driving Issues Compendium; a Grassroots Call to Action* (1989)(hereinafter MADD) at 6.1-6.16

2 National Safety Council, Committee on Alcohol and Other Drugs,Policy Statement, *Enforcement of Laws Aimed at Alcohol-Impaired Driving*, (1986).

3 AAA, *1990 Policy Book: Driving Under the Influence of Alcohol and Other Drugs*, (unpaginated)

Federal agencies charged with the responsibility for public safety, including the National Highway Traffic Safety Administration[4] and the National Transportation Safety Board recommend use of traffic sobriety checkpoints. Further, the Presidential Commission Against Drunk Driving recommended the same approach in its final report. Presidential Commission, at 14-15.

In December, 1988, Surgeon General Koop convened a series of Workshops on Drunk Driving which included representatives from all relevant federal agencies, as well as "experts who . . . represent the broad array of specialists who must work together to bring this pervasive behavior under control." *Proceedings* at iii. After reviewing the results of these proceedings, Dr. Koop called for increased enforcement of drunken driving laws including expanded use of traffic sobriety checkpoints as part of a comprehensive, ten-point plan. *Proceedings*, at 53. United States Public Health Service, *supra*, at 1-14.

Nor are motorists likely to oppose use of traffic sobriety checkpoints. Opinion surveys have found up to 90% of drivers favor the use of this procedure. Robert B. Voas, Eugene Rhodinizer and Cheryl Lynn, "Evaluation of Charlottesville Checkpoint Operations," National Highway Traffic Safety Administration, DOT HS 806 989, (1985).

It is ironic indeed that the individuals who brought suit against the state to prohibit sobriety checkpoints are all Michigan state legislators. These legislators evidently concluded that a legislative ban on sobriety checkpoints was impossible because the people of the state of Michigan simply would not permit such a ban

4 *Proceedings*, at 13

to be voted into law. Unable to generate public support, they turned to the courts.

In summary, traffic sobriety checkpoints are an effective and accepted law enforcement measure. Government and private agencies believe that such checkpoints are a necessary element to end a scourge which needlessly deprives our Nation of thousands of innocent persons each year. Most Americans favor the use of checkpoints.

Americans "have joined forces [to] reduce the frightening carnage that results from alcohol-related crashes." National Commission Report, at 5. Any court decision which declared, in practical terms, such checkpoints unconstitutional would have a devastating effect on efforts to stop drunk driving.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Constitutionality of Traffic Sobriety Checkpoints Presents An Important Question of Federal Law As to Which Local Governments Are in Doubt and Which Should be Clarified by This Court.

In *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court considered the constitutionality of a traffic stop when the motorist was halted simply because the officer was "not answering any complaints." 440 U.S. at 651. The Court reiterated a rule of reasonableness in gauging Fourth Amendment searches. 440 U.S. at 653-54. "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." 440 U.S. at 654.

This balancing test was used in the context of vehicular "checkpoint operations" in *United States v. Martinez-Fuerte*, 428 U.S. 543, 546 (1976), based on the lesser intrusion upon the motorists' Fourth Amendment interests. *Prouse*, 440 U.S. at 656. This Court in *Prouse* noted the difference between unacceptable random roving vehicle stops and traffic checkpoints examining all oncoming traffic. 440 U.S. at 657. Justices Blackmun and Powell would have gone beyond non-random stops of 100 percent of oncoming traffic to allowing stops of just ten percent of traffic. 440 U.S. at 664-65 (Blackmun, J., concurring).

Most state courts have abided by this Court's rule of reasonableness, requiring certain specific protections for motorists, but generally upholding traffic sobriety checkpoints. *See, Little v. Maryland*, 479 A.2d 903 (Md. 1984) and cases cited therein.

Unfortunately, local government officials have not understood this Court's analysis. In part, this lack of understanding seems due to the fact that the language in *Prouse* dealing with traffic checks did not cover traffic sobriety checkpoints directly and was not a clear enough holding to prevent fear of litigation.

Amicus RID-USA has 136 chapters operating in 36 states, through which the organization has advocated traffic sobriety checkpoints at both state and local levels. Amicus RID-USA has frequently found local government officials and their legal counsel bewildered by the conflicting arguments or simply intimidated by the likelihood of litigation in the absence of a definitive opinion from the Court.

This Court must make a clear and definite statement regarding the constitutional validity of traffic sobriety checkpoints. Only then will the recommenda-

tions of the National Commission Against Drunk Driving and other bodies be carried out.

II. The Decision of the Michigan Court Ignores This Court's Balancing Test

The traffic sobriety check established in Michigan followed a model successfully used in Maryland. *Little*, *supra*. The Maryland model followed programs upheld in many other states. *Id*, 479 A.2d at 911-12.

Yet, despite the need to address the danger represented by drunk driving, despite government and voluntary agency findings of effectiveness and need, despite *Prouse* and decisions of other states, the Michigan courts excised traffic sobriety check points from the arsenal of law enforcement techniques available to stop drunk driving. App. at 20a, 102a.

In deciding that the program produced no positive benefits to weigh against the subjective intrusion on liberty interests, the Court of Appeals relied heavily on the fact that "one per cent or fewer of the drivers passing through sobriety checkpoints are arrested for drunk driving." App., at 15a. This constituted for the court a "low drunk driving arrest rate." App. at 18a.

Thus, the Michigan courts found that "sobriety checkpoints were not an effective means of combating drunk driving." App. at 20a. It may well be that *no* step, working alone, can be effective enough to meet the demanding test set by the Michigan courts.

As the numerous government studies have indicated, if there is any hope it will arise from the synergistic effect of a number of techniques working together. Surgeon General Koop, in *Proceedings*, at iii, 11. "The key to continuing the campaign with any hope

for success is the coordination of *all* the components." National Commission Report, at 9.

To gather such an array of law enforcement techniques without trenching on legitimate protected constitutional interests is difficult enough. But to have so many government and individual agencies, courts and legislators agree on a reasonable method to both protect rights and deter drunk driving, only to have the Michigan courts establish an impossible burden, disheartens and frustrates many of those working on this issue.

III. This is An Appropriate Case for Review.

The Supreme Court should take the case for at least three reasons. First, the case presents an important issue of safety on the nation's highways. The number of lives affected and the amount of economic damage caused by alcohol related collisions each year is staggering. This is a severe national problem, and this Court has the power to allow state and local governments access to a vital enforcement technique.

Second, the widespread support for traffic sobriety checkpoints has caused many to be put in place, and any adverse positions taken by state courts will chill these activities even though they are permitted by the Fourth Amendment.

Third, the Michigan courts' application of the balancing test laid out in prior Court opinions is wrong. The courts below ignored the fact that we need a multifaceted approach to combat drunk driving. The courts also improperly balanced the interests of individuals in avoiding occasional brief stops against the interests of all to citizens to be safer from drunk driving on the

public roadways. This Court must correct the Michigan courts' interpretation of the Fourth Amendment.

CONCLUSION

For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

ROGER L. CONNER
Counsel of Record
JOHN ROELS
GEOFF GILLIS
WHEELER, UPHAM, BRYANT & UHL, P.C.
11th Floor, Trust Building
Grand Rapids, MI 49503
(616) 459-4634
Counsel for Movants

Supreme Court, U.S.
FILED
NOV 16 1989
SPANIOL, JR.
CLERK

No. 88-1897

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE, ET AL.,
PETITIONERS

v.

RICK SITZ, ET AL.

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether sobriety checkpoints, at which all vehicles are stopped briefly to enable police officers to observe for signs that the drivers are under the influence of alcohol or drugs, are unlawful under the Fourth Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
a. Site selection	3
b. Notice to the public	3
c. Safety and evidence of authority	3
d. Contact with motorists	3
Summary of argument	8
Argument:	
I. Brief nondiscretionary stops of motorists at sobriety checkpoints are a constitutionally permissible means of reducing drunk and drugged driving	10
A. Sobriety checkpoints are effective, together with other measures, in reducing drunk driving	12
B. Sobriety checkpoints intrude only minimally on Fourth Amendment interests	24
C. With respect to sobriety checkpoints, the balance of relevant interests justifies brief stops without individualized suspicion	29
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Breithaupt v. *Abram*, 352 U.S. 432 (1957)	12
Brown v. *Texas*, 443 U.S. 47 (1979)	5, 7, 11, 30
Cady v. *Dombrowski*, 413 U.S. 433 (1973)	24, 25
Colorado v. *Bertine*, 479 U.S. 367 (1987)	23, 28-29
Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	22
Delaware v. *Prouse*, 440 U.S. 648 (1979)	9, 10, 11, 12, 22, 27, 28
Donovan v. *Dewey*, 452 U.S. 594 (1981)	12
Griffin v. *Wisconsin*, 483 U.S. 868 (1987)	30
Illinois v. *Lafayette*, 462 U.S. 640 (1983)	23
Ingersoll v. *Palmer*, 43 Cal. 3d 1321, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987)	21
Little v. *State*, 300 Md. 485, 479 A.2d 903 (1984)	21

Cases—Continued: Page

Lockhart v. *McCree*, 476 U.S. 162 (1986) 21
Marshall v. *Barlow's, Inc.*, 436 U.S. 307 (1978) 12
Michigan v. *Long*, 463 U.S. 1032 (1983) 8
National Treasury Employees Union v. *Von Raab*, 109 S. Ct. 1384 (1989) 23, 30
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985) 11
New York v. *Burger*, 482 U.S. 691 (1987) 24
New York v. *Class*, 475 U.S. 106 (1986) 25
People v. *Bartley*, 109 Ill. 2d 273, 486 N.E. 2d 880, cert. denied, 475 U.S. 1068 (1985) 21
People v. *Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984) 21
Perez v. *Campbell*, 402 U.S. 637 (1971) 12
Schmerber v. *California*, 384 U.S. 757 (1966) 21
Skinner v. *Railway Labor Executives Ass'n*, 109 S. Ct. 1402 (1989) 11, 12, 23, 24, 26, 30
South Dakota v. *Neville*, 459 U.S. 553 (1983) 12
South Dakota v. *Opperman*, 428 U.S. 364 (1976) .. 25
State v. *Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983) 22
State v. *Koppel*, 127 N.H. 286, 499 A.2d 977 (1985) 22
State v. Smith, 674 P.2d 562 (Okla. 1984) 22
Terry v. *Ohio*, 392 U.S. 1 (1968) 22
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 11, 25, 26
United States v. *DeAngelo*, 584 F.2d 46 (4th Cir. 1978), cert. denied, 440 U.S. 935 (1979) 11
United States v. *Freeland*, 562 F.2d 383 (6th Cir.), cert. denied, 434 U.S. 957 (1977) 11
United States v. *Leon*, 468 U.S. 897 (1984) 21
United States v. *Lopez-Pages*, 767 F.2d 776 (11th Cir. 1985) 10
United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976) 10, 11, 12, 21, 23-24, 25, 26, 27, 30
United States v. *Montoya de Hernandez*, 473 U.S. 531 (1985) 11
United States v. *Ortiz*, 422 U.S. 891 (1975) 25, 28
United States v. *Sharpe*, 470 U.S. 675 (1985) 11
Wyman v. *James*, 400 U.S. 309 (1971) 11

Constitutions, statutes and regulations: Page

U.S. Const. Amend. IV 4, 7, 8, 9, 10, 11, 22, 24, 26, 29
Michigan Const. art. I, § 11 4
Drunk Driving Prevention Act of 1988, Pub. L. No. 100-690, 100 Stat. 4521 2
Highway Safety Act, 23 U.S.C. 401 *et seq.*:
23 U.S.C. 402 (1982 & Supp. V 1987) 2
23 U.S.C. 408 (1982 & Supp. V 1987) 13-14
23 U.S.C. 408(a) (1982 & Supp. V 1987) 1
23 U.S.C. 408(e)-(f) 2
Michigan Administrative Procedure Act, Mich. Comp. Law. Ann. § 24.207 (1981) 4
23 C.F.R. 1309.5-1309.7 ..... 2, 20
23 C.F.R. 1309.6(b)(11) 2, 14

Miscellaneous:

R. Compton & R. Engle, *The Use of Safety Checkpoints for DWI Enforcement* (DOT HS 806 476 1983) 4
54 Fed. Reg. 26,795 (June 26, 1989) 2
J. Hause, R. Voas & E. Chavez, *Conducting Voluntary Roadside Surveys: The Stockton Experience* (1980) 15
R. Hingson & J. Howland, *Public Perceptions About Drunk Driving Roadblocks: Surveys in Massachusetts Where Roadblocks are Used and New Hampsire Where They Are Prohibited* 17
R. Homel, D. Carseldine & I. Kearns, *Drink-Driving Countermeasures in Australia*, 4 Alcohol, Drugs & Driving 113 (No. 2 1987) 19, 20
Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75 21
J. Lacey, J. Stewart, et al., *Enforcement and Public Information Strategies for DWI General Deterrence: ARREST DRUNK DRIVING—The Clearwater and Largo, Florida Experience* (DOT HS 807 066 Dec. 1986) 17, 18
W. LaFave, *Search and Seizure* (2d ed. 1987) 25
D. Levy, P. Asch & D. Shea, *An Assessment of DWI Programs in New Jersey* (1987) 18, 19

Miscellaneous—Continued: Page

D. Levy, D. Shea & P. Asch, *A Further Assessment of DWI Programs in New Jersey* (1987).. 19
A. Lund & A. Wolfe, *Changes in the Incidence of Alcohol-Impaired Driving in the United States, 1973-1986*, Insurance Institute for Highway Safety (Feb. 1989) 13
Missouri Div. of Highway Safety, *Sobriety Checkpoint Survey: 1985 Report of Findings* 17
National Highway and Traffic Safety Administration, *Alcohol Involvement in Fatal Traffic Crashes 1988* (DOT HS 807 448 July 1989)....12, 13, 15
National Highway Traffic Safety Administration, *Drunk Driving Facts* (July 1989) 13
National Highway Traffic Safety Administration, *Fatal Accident Reporting System: Alcohol Involvement in Fatal Crashes: Recent Trends: 1982-1988* 15
National Traffic Safety Board, *Highway Accident Report: Pickup Truck/Church Activity Bus Head-On Collision and Fire Near Carrollton, Kentucky, May 14, 1988* (NTSB/HAR-89/01 Mar. 1989) 14
National Traffic Safety Board, *Safety Study: Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations* (NTSB/SS-84/01 Apr. 1984)..... 14
Presidential Commission on Drunk Driving, *Final Report* (Nov. 1983) 14
H. Ross, *Deterring the Drinking Driver* (1984)..... 16, 20
Ross, *Reflections on Doing Policy-Relevant Sociology: How to Cope with MADD Mothers*, 18 Am. Sociologist 173 (1987) 20
Surgeon General's Workshop on Drunk Driving: *Proceedings* (1988) 14
R. Voas, E. Rhodenizer & C. Lynn, *Evaluation of Charlottesville Checkpoint Operations* (DOT HS 806 989 May 1985) 16, 17, 18
A. Williams & A. Lund, *Deterrent Effects of Roadblocks on Drinking And Driving*, Traffic Safety Evaluation Res. Rev. (Nov.-Dec. 1984).. 16, 17

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1897

MICHIGAN DEPARTMENT OF STATE POLICE, ET AL., PETITIONERS

v.

RICK SITZ, ET AL.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether sobriety checkpoints, at which all motorists are stopped and examined briefly for signs that they are driving under the influence of alcohol or drugs, are unlawful under the Fourth Amendment. The Department of Transportation, acting through the National Highway Traffic Safety Administration (NHTSA), plays a major role in efforts to promote highway safety and, more particularly, to reduce the incidence of drunk driving. NHTSA's studies have shown that sobriety checkpoints are an effective part of a comprehensive program to combat drinking and driving. Accordingly, it has encouraged States to implement —and has provided substantial technical assistance and funding for—sobriety checkpoint programs similar to the one at issue in this case.

Under the Highway Safety Act, 23 U.S.C. 408(a) (1982 & Supp. V 1987), NHTSA is charged with

administering a grant program that provides funding to States "which adopt and implement effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol or a controlled substance." States qualify for basic and supplemental grants by demonstrating that they have adopted measures prescribed by the statute (23 U.S.C. 408(e)-(f)) and regulations promulgated by NHTSA (23 C.F.R. 1309.5-1309.7). One of the measures that States may adopt to qualify for supplemental grants under this program is the "[u]se of roadside sobriety checks as part of a comprehensive alcohol safety enforcement program." 23 C.F.R. 1309.6(b)(11).[1] In addition, funds provided by NHTSA to the States under Section 402 of the Highway Safety Act, 23 U.S.C. 402 (1982 & Supp. V 1987), have been used to finance sobriety checkpoint programs.[2]

In addition to encouraging and funding the use of sobriety checkpoints by local law enforcement agencies, the federal government has used sobriety checkpoints on miiltary and other federal reservations, and has an interest in continuing to do so.

STATEMENT

1. In 1985, Michigan's Drunk Driving Task Force issued a report recommending, among other things,

[1] NHTSA recently promulgated proposed regulations that would govern eligibility for grants under the Drunk Driving Prevention Act of 1988, Pub. L. No. 100-690, 100 Stat. 4521, under which States would be required, as a condition for federal funding, to implement "[r]egularly conducted, peak-hour DWI enforcement efforts consisting of measures, such as roadside sobriety checkpoints or special DWI patrols." 54 Fed. Reg. 26,795 (1989).

[2] The federal government has devoted substantial effort and funding to the goal of reducing the drunk driving problem. For fiscal years 1982 through 1987, NHTSA disbursed approximately $266,000,000 under the Highway Safety Act to combat drunk driving.

the use of sobriety checkpoints. The Governor of Michigan then directed the State Police to implement a pilot program, and an advisory committee appointed by the Director of State Police prepared detailed guidelines with respect to checkpoint site selection, publicity, and operations. Pet. App. 3a-5a. See *id.* at 133a-164a.

According to the guidelines, the purpose of sobriety checkpoints was "to impact the drunk driving problem by increasing the perception that the drunk driver will be detected and arrested." Pet. App. 144a. Checkpoints were to be conducted in accordance with the following directives:

a. *Site selection.*—Criteria for checkpoint site selection were to be approved by the Director of State Police and were to take account of the locations of past arrests and accidents. Pet. App. 148a-149a.

b. *Notice to the public.*—Although the exact time and location of checkpoints were not to be disclosed in advance, the fact of their use was to "be widely publicized to enhance the desired deterrent effect among potential drunk drivers." Pet. App. 152a.

c. *Safety and evidence of authority.*—Each checkpoint was to be staffed by a specified number of uniformed police officers. The checkpoints were to be established in safe locations, lit, and marked with signs, flares, reflectors, and or cones. Pet. App. 149a-150a, 152a-153a.

d. *Contact with motorists.*—Each vehicle passing through a checkpoint was to be stopped. After identifying himself and explaining the purpose of the checkpoint, an officer was to to look for "articulable indications of intoxication," including odor, slurred speech, lack of physical coordination, unusual eye movements, and disorientation. If the officer detected an indication of intoxication, the driver was to be directed to a location out of the path of traffic, asked

for a driver's license and registration, and asked to perform field sobriety tests, a breath test, or both. Upon sufficient evidence of intoxication, the driver was to be arrested. Pet. App. 154a-156a, 161a-163a.[3]

2. Between 11:45 p.m. and 1:00 a.m. on May 17-18, 1986, one checkpoint operation was conducted in accordance with the guidelines. One hundred twenty-six vehicles passed through the checkpoint, with an average delay to each motorist of 25 seconds or less. Field sobriety tests were administered to two drivers who stopped at the checkpoint; one was arrested for driving under the influence of alcohol. Another driver was arrested for driving under the influence after he drove through the checkpoint without stopping. Pet. App. 6a-7a.

3. The day before the first checkpoint was established, respondents initiated an action for a declaratory judgment and an injunction. Their complaint alleged that the checkpoint program violated the Fourth Amendment of the United States Constitution and Article 1, § 11 of the Michigan Constitution; that the program had been promulgated in violation of the Michigan Administrative Procedure Act, Mich. Comp. Law. Ann. § 24.207 (West 1981); and that the State lacked authority under state law to conduct the program. Pet. App. 29a-30a.[4]

After hearing evidence, the state trial court held that the sobriety checkpoint program violated both the Fourth Amendment and the state constitution. The court ruled that the program's legality should be determined by reference to the factors enumerated

---

[3] These procedures are consistent with the guidelines NHTSA has promulgated informally. R. Compton & R. Engle, *The Use of Safety Checkpoints for DWI Enforcement* 11-14 (DOT HS 806 476 1983).

[4] The trial court rejected the last two of these claims (Pet. App. 36a-44a), and the Michigan Court of Appeals did not address them.

by this Court in *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979); those factors are "the gravity of the public concerns served by the [program], the degree to which the [program] advances the public interest, and the severity of the interference with individual liberty." See Pet. App. 57a-58a, 72a.

a. The court observed that it was "largely conceded by all that the State has a keen interest in curbing drunk driving." Pet. App. 73a. Indeed, although noting that witnesses had differed on precisely how many persons are killed or injured by drunk drivers, the trial court concluded that "there is a grave and legitimate State interest in curbing drunk driving." *Id.* at 74a.

b. The court then addressed the extent to which sobriety checkpoints advance that interest—an inquiry which it understood to encompass "not only * * * how effective the technique is, but also * * * the degree to which it can be said that there are no permissible alternative means available to the police which advance the particular state concern." Pet. App. 75a. Relying on evidence and authorities suggesting that the number of motorists arrested at sobriety checkpoints is a small percentage of the drivers who pass through them, the court concluded that "sobriety checkpoints have not been shown to be an effective means for apprehending drunk drivers." *Id.* at 83a.

The state court turned next to the question whether checkpoints would act as a deterrent to drunk driving, and found that the State's showing on that point was "not of a sufficient persuasive value to support the conclusion that checkpoints have a deterrent effect." Pet. App. 92a. The court credited testimony by respondents' expert that checkpoints would not have "any long term, or lasting deterrent effect." *Id.* at 92a-94a. Invoking its finding that

sobriety checkpoints are not an effective means of apprehending drunk drivers, the court reasoned that once the public became aware of the low arrest rate, "it cannot be reasonably supposed that those who are inclined to drink and drive will perceive a sobriety checkpoint as a significant threat to their being arrested." *Id.* at 95a-96a.

Finally, the court "examine[d] the extent to which there [were] no practical alternative means available to the State to advance its interest other than by implementing sobriety checkpoints." Pet. App. 96a. The court dismissed evidence that routine methods of law enforcement had not reduced the level of alcohol-related accidents, finding that "this data does not demonstrate that checkpoints are the *only* practical alternative." *Id.* at 97a. The court also referred to evidence that other programs had reduced alcohol-related accidents; in addition, the court expressed concern that other recommendations by Michigan's Drunk Driving Task Force had not been implemented. *Id.* at 98a-101a. The trial court ruled "that while drunk driving remains a grave problem, other programs which rely on approved methods of law enforcement can, and do, in fact, have a positive effect in reducing drunk driving accidents and fatalities." *Id.* at 101a.

c. With respect to the intrusiveness of sobriety checkpoints, the court found that the average motorist's encounter with police at a sobriety checkpoint lasts approximately 30 seconds and that "the intensity of the investigation" during that period is "not great." Pet. App. 103a-104a. Accordingly, the court found that the "objective nature of the intrusion [is] minimal." *Id.* at 104a. The court also concluded that the State's guidelines would "ensure that on-the-scene officers' discretion relative to the operation of

sobriety checkpoints will be minimal." *Id.* at 113a. However, the court found that there were other factors that could contribute to the intrusiveness of the procedure—the fact that checkpoints would not be situated at fixed locations, the possibility that news media might not publicize plans to establish checkpoints, motorists' likely unawareness of opportunities to avoid checkpoints, and the fact that checkpoints would be used to search for violations of criminal law. *Id.* at 108a-110a. The court also expressed the view that sobriety checkpoints "[went] beyond the traditionally recognized reasons for stopping motorists in their cars," and suggested that checkpoints were susceptible to abuse. *Id.* at 115a. On balance, the court concluded that the checkpoints would have "a significant subjective intrusive impact on a person's liberty interest." *Id.* at 119a.

Weighing the *Brown* factors, the trial court ruled that the checkpoint program violated the Fourth Amendment. See Pet. App. 119a-124a. The court also construed the State's constitution to forbid any seizure of motorists "absent at least an individualized articulable suspicion that some criminal wrongdoing had or was about to occur." *Id.* at 130a-131a.

4. The Michigan Court of Appeals affirmed with respect to the trial court's Fourth Amendment holding. It agreed that the legality of the sobriety checkpoint plan should be determined by reference to the three factors set out in *Brown* v. *Texas*, *supra*. Pet. App. 12a. Applying the "clearly erroneous" standard to the trial court's rulings on each of those factors, the state appellate court concluded that there was no basis for disturbing the trial court's determinations. *Id.* at 12a, 13a-22a. The court of appeals held that "[w]hile the goals of the sobriety checkpoint program are laudable, the program fails to

qualify as a reasonable seizure under the Fourth Amendment." *Id.* at 23a.[5]

The Michigan Supreme Court, noting two dissents, denied petitioners' application for leave to appeal to that court. Pet. App. 1a.

SUMMARY OF ARGUMENT

In 1988, more than 47,000 Americans were killed in traffic crashes. Twenty-five percent of the drivers involved were intoxicated, and alcohol was involved in some form in about half of those fatalities. In an effort to reduce this carnage, a number of States, with encouragement and funding from the National Highway Traffic Safety Administration, have implemented sobriety checkpoint programs. The program at issue in this case has the features of such federally encouraged efforts. Every motorist who reaches a well-lit, well-marked checkpoint is observed, for about 30 seconds, for signs of intoxication. Drivers who do not exhibit signs of intoxication are allowed to leave immediately: the others are asked to take a breath test, field sobriety tests, or both. If the tests provide probable cause to believe that a driver is intoxicated, he or she is arrested.

In our view, the state courts erred in concluding that these procedures subject motorists to seizures that are "unreasonable" under the Fourth Amendment. Because this case involves a facial challenge to the checkpoint program, as opposed to a claim

[5] The court of appeals found it unnecessary to reach the trial court's interpretation of the Michigan Constitution; the court explained that the state constitution "offers at least the same protection as accorded by the Fourth Amendment and [that the court had] already found the checkpoint program to be an unreasonable seizure under the Fourth Amendment." Pet. App. 24a. In view of this holding, it is clear that the Michigan Constitution does not provide an independent and adequate ground for the appellate court's judgment. See *Michigan* v. *Long*, 463 U.S. 1032, 1037-1044 (1983).

that an individual motorist was detained without sufficient cause, we focus on the brief, nondiscretionary stops to which all motorists entering a checkpoint are exposed. The Court's cases make clear that the legality of those stops "is judged by balancing [their] intrusion on the individual's Fourth Amendment interests against [their] promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). In view of the effectiveness and minimal intrusiveness of sobriety checkpoints, they are reasonable means of combatting drunk driving; this is an instance "in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion.'" *Id.* at 654-655.

A. There can be no dispute over the seriousness of the drunk driving problem in this country. In terms of deaths, injuries, economic loss, and human suffering, the problem is of grave dimensions. For years, drunk driving has been stubbornly resistant to a variety of counter-measures. However, experience here and abroad now suggests that sobriety checkpoints provide a promising means of deterring drinking and driving. By virtue of their visibility, sobriety checkpoints contribute to the perception that people who drink and drive will be apprehended. Where sobriety checkpoints have been used, there have frequently been immediate reductions in alcohol-related crashes. Moreover, there is evidence that those reductions can be sustained for substantial periods of time.

B. On the other side of the balance, a number of circumstances, taken together, assure that sobriety checkpoints intrude only minimally on Fourth Amendment interests. First, persons driving on public roads have a limited expectation of privacy; that expectation is particularly narrow with respect to measures whose purpose is to enforce traffic safety laws.

Traffic stops for that purpose have a long history and have come to be accepted by motorists as incident to highway use. Second, each driver is stopped only briefly, along with other motorists, at a well-marked and well-lit checkpoint. Finally, the discretion of officers in the field is narrowly circumscribed.

C. Under these circumstances, no individualized suspicion is required to make sobriety checkpoint stops "reasonable" for purposes of the Fourth Amendment. The effectiveness of sobriety checkpoints derives from their universal, predictable, and visible applicability to all motorists. The resulting intrusion on individual interests is minimal. And, in place of individualized suspicion, rigorous limits on police discretion protect individuals from invidious or arbitrary official action.

ARGUMENT

I. BRIEF NONDISCRETIONARY STOPS OF MOTORISTS AT SOBRIETY CHECKPOINTS ARE A CONSTITUTIONALLY PERMISSIBLE MEANS OF REDUCING DRUNK AND DRUGGED DRIVING

The legal framework to guide the Fourth Amendment analysis in this case is well established. We assume, for purposes of this case, that the stops occurring at sobriety checkpoints constitute "seizures" within the meaning of the Fourth Amendment.[6] The

[6] See *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 546 n.1, 556 (1976). There was testimony in the state trial court that Michigan's sobriety checkpoints were required to be established in areas where it was possible for a motorist to make a legal U-turn and that motorists were permitted to refuse to roll down their windows when approached by police. Pet. App. 109a. However, those aspects of the program were apparently not well publicized. In our view, the legality of the checkpoints is not dependent on whether motorists may be deemed to have consented to a particular stop. Cf. *United States* v. *Lopez-Pages*, 767 F.2d 776, 779 n.2 (11th Cir. 1985); *United States* v. *DeAngelo*, 584 F.2d 46, 47-48 (4th Cir. 1978), cert. denied, 440 U.S. 935 (1979); *United States* v. *Freeland*, 562 F.2d 383, 385-386 (6th Cir.), cert. denied, 434 U.S. 957 (1977).

fundamental question under the Fourth Amendment is whether those "seizures" are reasonable. *Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. 1402, 1414 (1989) ("the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable"); *United States* v. *Sharpe*, 470 U.S. 675, 682 (1985). What is reasonable "depends on all the circumstances surrounding the search or seizure itself." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985). See *Wyman* v. *James*, 400 U.S. 309, 318 (1971); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). The permissibility of a program such as sobriety checkpoints " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmenal interests,' " *Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. at 1414 (quoting *Delaware* v. *Prouse*, 440 U.S. at 654). Accord, *e.g.*, *Brown* v. *Texas*, 443 U.S. at 50-51; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

The reasonableness standard usually requires that "the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." *Delaware* v. *Prouse*, 440 U.S. at 654. See *Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. at 1414. The Court has recognized a number of situations, however, "in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion.' " *Delaware* v. *Prouse*, 440 U.S. at 654-655. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental in-

terest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. at 1417. See *United States* v. *Martinez-Fuerte*, 428 U.S. at 560-561. In those situations, "other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Delaware* v. *Prouse*, 440 U.S. at 655, 661. See, *e.g.*, *Donovan* v. *Dewey*, 452 U.S. 594, 601-604 (1981); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). Under these standards, sobriety checkpoints are reasonable and thus pass constitutional muster.

A. Sobriety Checkpoints Are Effective, Together With Other Measures, In Reducing Drunk Driving

1. By many measures, drunk driving is among the most critical threats to the health and well-being of our Nation's citizens.[7] According to statistics compiled by NHTSA, more than 47,000 people were killed in traffic crashes in 1988. NHTSA, *Alcohol Involvement in Fatal Traffic Crashes 1988*, at 5 (DOT HS 807 448 July 1989) [hereinafter *Fatal Traffic Crashes*]. Almost 25% of the drivers involved in these crashes had blood alcohol concentrations in excess of 0.10%, the legal standard for intoxication in most States. *Id.* at 11.[8] Another 7.9% had a lower

[7] This Court has taken note of the problem on several occasions. *South Dakota* v. *Neville*, 459 U.S. 553, 558 (1983) ("carnage caused by drunk drivers is well documented"); *Breithaupt* v. *Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."). See also *Perez* v. *Campbell*, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring).

[8] By contrast, even between 10 p.m. and 3 a.m. on weekend nights, the peak period for drinking and driving, the most recent roadside survey found that an average of 3.2% of the drivers on the road had blood alcohol concentrations of 0.10% or higher. A. Lund & A. Wolfe, *Changes in the Incidence of Alcohol-Impraired Driving in the United States, 1973-1986*, Insurance Institute for Highway Safety 25 (Feb. 1989).

level of alcohol in their blood. *Ibid.* Alcohol was involved in some form in nearly half—more than 23,000—of the fatalities that resulted from traffic crashes. *Id.* at 5.[9] In addition to the fatalities, each year approximately 500,000 persons sustain injuries, 40,000 of them serious, in alcohol-related crashes. NHTSA, *Drunk Driving Facts* 1 (July 1989). Two of every five Americans can expect to be in an alcohol-related crash at some time in their lives. *Id.* at 3.

The impact on the young has been particularly severe. Traffic crashes are the leading single cause of death for every age between 5 and 34; more than half of those fatalities result from alcohol-related crashes. *Drunk Driving Facts* 1 (July 1989). The costs in terms of pain and suffering imposed on the survivors and caretakers of the spouses, children, parents, and friends who are killed or permanently injured in alcohol-related crashes are simply incalculable.

2. In the past decade, federal studies have uniformly concluded that sobriety checkpoints can play an important role in reducing the incidence of drunk driving. In February 1983, NHTSA promulgated regulations establishing, as one criterion for federal funding under Section 408 of the Federal Highway

[9] Thirty-nine percent of all fatalities from traffic crashes occurred in crashes in which a driver or non-occupant—*i.e.*, an involved pedestrian or bicyclist—had a blood alcohol concentration exceeding 0.10%, the legal limit for intoxication prescribed by most States. *Fatal Traffic Crashes*, at 5. Another 10% of the fatalities involved alcohol at a lower level.

These figures are estimates, inasmuch as the blood of each driver, pedestrian, and bicyclist involved in a crash is not actually tested. NHTSA uses validated statistical techniques to estimate alcohol involvement in those cases in which tests have not been performed.

Act, the "[u]se of roadside sobriety checks as part of a comprehensive alcohol safety enforcement program." [10] Later the same year, the President's Commission on Drunk Driving recommended "the use of preliminary breath testing devices and judicially approved roadblocks, to achieve a high perception of risk of detection for driving under the influence." Presidential Commission on Drunk Driving, *Final Report* 14-15 (Nov. 1983). In 1984, the National Transportation Safety Board, an independent agency, concluded that sobriety checkpoints and administrative license revocations were "potentially effective deterrent measures that warrant broader application by the States" and that those measures "should be an integral part of a State's comprehensive alcohol and highway safety program." NTSB, *Safety Study: Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations* 20 (NTSB/SS-84/01 Apr. 1984).[11] Recently, during the Surgeon General's Workshop on Drunk Driving, a panel on law enforcement recommended "[i]mplement[ing] DUI checkpoints in those jurisdictions not using them, and expand[ing] their use in jurisdictions using them." Surgeon General's Workshop on Drunk Driving, *Proceedings* 53 (1988). As demonstrated below, these conclusions are consistent with —and have been based upon—a substantial and growing body of research demonstrating that sobri-

[10] This regulation has since been codified, as amended, at 23 C.F.R. 1309.6(b)(11).

[11] The NTSB has called attention to its recommendation on sobriety checkpoints on a number of occasions, most recently in connection with its investigation of a tragic collision between a pickup truck, whose driver was intoxicated, and a bus, in which 26 people were killed. NTSB, *Highway Accident Report: Pickup Truck/Church Activity Bus Head-On Collision and Fire Near Carrollton, Kentucky, May 14, 1988*, at 50-51 (NTSB/HAR-89/01 Mar. 1989).

ety checkpoints can contribute to reductions in drunk driving.

3. The pervasiveness of drinking and driving in this country has made that problem resistant to traditional law enforcement techniques. During weekend nights, approximately 3% of all drivers on the road will have blood alcohol concentrations exceeding the legal limit for intoxication. See note 8, *supra*.[12] As a practical matter, it is impossible for police, with limited manpower, to arrest a substantial number of those individuals and remove them from the road. Even in high enforcement areas, only about 1 in 250 such drivers will be apprehended on any given night. J. Hause, R. Voas & E. Chavez, *Conducting Voluntary Roadside Surveys: The Stockton Experience* 12 (1980) (available from NHTSA, NTS-20). Indeed, of all drivers involved in fatal alcohol-related crashes in 1988, only 13.3% had *ever* previously been convicted for driving under the influence. NHTSA, *Fatal Accident Reporting System: Alcohol Involvement in Fatal Crashes: Recent Trends: 1982-1988*, at 13 (available from NHTSA, NTS-20). From these figures, it is clear that any law enforcement program to reduce drunk driving cannot rely primarily on apprehending those who drink and drive. By necessity, such programs must emphasize general deterrence.

Notwithstanding sustained efforts by governments and citizen groups to communicate to the public the danger of drinking and driving, the risk of death or serious injury is not sufficiently immediate to motivate many drinking drivers to change their behavior. Research suggests, however, that some of those individuals will react to a threat that they may

[12] During those weekend nights, in 1988, 44.1% of the men and 28.4% of the women involved in fatal crashes had blood alcohol levels exceeding 0.10%. *Fatal Traffic Crashes* at 12.

perceive as more immediate—the risk that they will be caught and subjected to reasonably swift and certain sanctions. See H. Ross, *Deterring the Drinking Driver* 110 (1984) ("The accumulated knowledge in this area indicates that an important element of a deterrence-based program is the presentation to drinking drivers of a subjectively important chance of apprehension should they commit the violation."). Public officials have therefore attempted to deploy their limited resources—resources that permit apprehension of only a small percentage of drinking drivers—to maximize the public's perception of that risk.

Research supports the proposition that sobriety checkpoints have been effective for that purpose. Several studies reflect that the public perceives that an intoxicated driver is more likely to be arrested in an area in which checkpoints are employed than in otherwise similar areas in which checkpoints are not used. For instance, after police in Charlottesville, Virginia, employed sobriety checkpoints for almost a year, a survey was conducted of residents of that city. More than half reported that a drinking driver was more likely to be arrested in Charlottesville than in other cities in Virginia; more than 70% said that the likelihood of arrest was greater at the time of the survey than before checkpoints were put into use. A substantial number of the drivers surveyed reported that checkpoints were the reason why arrest had become more likely. R. Voas, E. Rhodenizer & C. Lynn, *Evaluation of Charlottesville Checkpoint Operations* 27-28 (DOT HS 806 989 May 1985). In a control city where checkpoints were not used, comparable figures were lower.[13]

[13] Other studies have reached similar conclusions. A. Williams & A. Lund, *Deterrent Effects of Roadblocks on Drinking And Driving*, 3 Traffic Safety Evaluation Res. Rev. 12 (Nov.-Dec. 1984) (surveys of residents in (i) Montgomery County, Maryland, where checkpoints were used, and Fairfax County, Virginia, where they were not, and (ii) Kent and Sussex Counties in Delaware, where checkpoints were used, and Maryland's Eastern Shore, where they were not; majorities of all areas surveyed believed that DUI arrests were more likely in areas in which checkpoints were used); R. Hingson & J. Howland, *Public Perceptions About Drunk Driving Roadblocks: Surveys in Massachusetts Where Roadblocks Are Used and New Hampshire Where They Are Prohibited* 4-7 (available from NHTSA, NTS-20) surveys of residents in Massachusetts and New Hampshire showed that residents of both States believed (i) that the likelihood of a drunk driver's being tested and charged at a checkpoint was greater than after a stop by a roving patrol, and (ii) that drunk drivers were more likely to be arrested in Massachusetts, where checkpoints were employed, than in New Hampshire, where they were not). See also J. Lacey, J. Stewart, et al., *Enforcement and Public Information Strategies for DWI General Deterrence: ARREST DRUNK DRIVING—The Clearwater and Largo, Florida Experience* 54-58 (DOT HS 807 066 Dec. 1986); Missouri Div. of Highway Safety, *Sobriety Checkpoint Survey: 1985 Report of Findings* 2.

Several of those surveys indicated that persons who drink and drive are less likely to do so in areas where checkpoints are present. See J.H. Lacey, J.R. Stewart, et al., *supra*, at 56 (while checkpoint program in place, increasing percentages of drivers indicated that they had not driven after having too much to drink); R. Voas, E. Rhodenizer & C. Lynn, *supra*, at 38 (many servers at restaurants and bars reported decreased drinking while checkpoint program was in place); but see A. Williams & A. Lund, *supra*, at 17 (limited evidence suggests that checkpoints did not change drinking and driving behavior); R. Hingson & J. Howland, *supra*, Table 5 (absence of statistically significant figures suggesting such a change).

There are several plausible explanations for this phenomenon. Many more drivers on the road during high-risk driving hours are exposed to checkpoints than any other enforcement procedure. Checkpoints thus alert the public to the risk of their being detected if they drink and drive. When they have been employed, checkpoints have typically been the focus of intense media attention. Drivers may believe that, while they can elude a roving patrol by driving "carefully," they are less likely to avoid detection in a face-to-face encounter with a police officer. Finally, checkpoints may produce as many actual arrests, or

more, than traditional patrols, measured in terms of officer-hours.[14]

Of course, the purpose of sobriety checkpoints—and the critical yardstick by which any drunk driving program should ultimately be judged—is the reduction of alcohol-related crashes. On this point, studies in this country reflect that the systematic use of sobriety checkpoints results in reductions in alcohol-related crashes. In Charlottesville, during the year that sobriety checkpoints were used, the number of accidents in which an officer reported that the driver had been drinking declined by 15% from the level of the prior two years. Charlottesville's share of all traffic crashes statewide in which an officer reported that the driver had been drinking also declined, an indication that it was achieving better results in reducing alcohol-related crashes than areas of the Commonwealth where checkpoints were not being used. R. Voas, E. Rhodenizer & C. Lynn, *supra*, at 44; see *id.* at 46 (figures consistent with 10% overall reduction in alcohol-related crashes). Similar results were achieved in other States.[15]

Notwithstanding the evidence that checkpoints produce immediate reductions in alcohol-related crashes, the trial court credited the testimony of respondents'

---

[14] The study of the use of checkpoints in Charlottesville in 1983-1984, R. Voas, E. Rhodenizer, C. Lynn, *supra*, at 8, showed that one DUI arrest was made for each 6.5 hours of officer time at checkpoints, as opposed to one arrest for each 7.9 hours of officer time on traditional DUI patrols.

[15] J. Lacey, J. Stewart, et al., *supra*, at 59-65 (concluding that the combined checkpoint and public information program were effective in reducing alcohol-related crashes); D. Levy, P. Asch & D. Shea, *An Assessment of DWI Programs in New Jersey* 27 (1987) (available from NHTSA, NTS-20) (checkpoint program achieved a reduction of 14-24% in single-vehicle-nighttime accidents (a representative measure of alcohol-related crashes) in Bergen County, New Jersey, during 1983 and 1984).

expert that checkpoints do not have a long term, deterrent effect. Pet. App. 92a-93a. However, in our view, the indisputable savings in lives and well-being that accompany even temporary reductions in alcohol-related crashes provide a sufficient basis for the discriminating use of sobriety checkpoints, since those reductions involve many lives that would otherwise have been lost.

Further, even if the trial court's approach were appropriate, studies of roadside checkpoints in Bergen County, New Jersey, and in Australia demonstrate that sobriety checkpoints have contributed to substantial long-term reductions in alcohol-related crashes. In Bergen County, sobriety checkpoints led to a 14% to 24% reduction in single-vehicle nighttime crashes, a representative measure of alcohol-related crashes, for the first nineteen months of their use, from May 1983 through December 1984. See D. Levy, P. Asch & D. Shea, *An Assessment of DWI Programs in New Jersey* 27 (1987). A follow-up study reflected a further reduction in the next year. D. Levy, D. Shea & P. Asch, *A Further Assessment of DWI Programs in New Jersey* 8 (1987) (reduction by 29.5%). In 1982, authorities in New South Wales, Australia, instituted an intensive program of "random breath testing." R. Homel, D. Carseldine & I. Kearns, *Drink-Driving Countermeasures in Australia*, 4 Alcohol, Drugs & Driving 113, 114 (No. 2 1987) [hereinafter *Australian Countermeasures*].[16] For a five-year period, New South Wales maintained a 22% reduction in fatal crashes. *Id.* at 132. The average number of "classic' alcohol-related crashes" declined by 35%. *Ibid.* The

---

[16] Random breath testing involves arbitrarily selected checkpoints, usually on main roads. Motorists are pulled over randomly, without regard to age, sex, or manner of driving. *Australian Countermeasures* at 114. This program varies from sobriety checkpoints in this country, in that here all motorists or a structured sample (1 in every 5, for instance) are stopped at the checkpoint.

number of drivers and riders killed in traffic crashes whose blood alcohol content exceeded 0.05% fell by 36%. *Ibid.* These effects are both impressive and long-lasting, particularly when viewed in light of the persistence of the drunk driving problem in the United States.[17]

To be sure, sobriety checkpoints are not a panacea. They are effective only when used with a variety of measures, including public education, treatment programs, and streamlined procedures for imposing appropriate sanctions on those who are apprehended.[18] Moreover, there is debate about how effective sobriety checkpoints, or any other law enforcement technique, can be over the long run. See H. Ross, *supra*, at 99-115, 122-123. Nevertheless, there is now very substantial evidence that sobriety checkpoints contribute to an immediate reduction in alcohol-related crashes, and that these reductions are sustainable. This evidence provides a more than sufficient basis for using sobriety checkpoints as a promising means of mitigating one of the Nation's most serious public safety problems.

---

[17] Even critics of sobriety checkpoints have been impressed by this data. Respondents' expert testified in this case in mid-1986. Roughly a year later, he published an article in which he stated (Ross, *Reflections on Doing Policy-Relevant Sociology: How to Cope with MADD Mothers*, 18 Am. Sociologist 173, 177 (1987)):

> The necessity to change opinions due to new research constitutes another pitfall for the researcher in the politically sensitive area. * * * For example, although the U.S. research has been flawed and unconvincing, recent research in Australia suggests that police roadblocks may be more effective than other kinds of patrol in producing the impression of certain punishment for drunk-driving offenders. Although I have strong personal reservations related to the intrusiveness of these techniques, I have had to modify my testimony in cases concerning their constitutionality after reading the Australian reports.

[18] NHTSA's criteria for the distribution of funds under Section 408 of the Highway Safety Act illustrate the range of measures that may contribute to a solution. 23 C.F.R. 1309.5–1309.7.

4. Much of the material we have summarized was apparently not before the trial court. See Pet. App. 84a-94a. However, we believe that this Court may properly consider it. This case involves a facial challenge to a sobriety checkpoint program that has been allowed to operate on only one occasion. Its legality cannot be evaluated on its own record. Compare *United States* v. *Martinez-Fuerte*, 428 U.S. at 554. The question whether sobriety checkpoints advance the interest in reducing drunk driving is an issue of "legislative fact." See, *e.g.*, *Lockhart* v. *McCree*, 476 U.S. 162, 168-169 & n.3 (1986) (analyzing data on the extent to which "death qualification" procedures produce "conviction-prone" jurors); *Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966) (effectiveness and intrusiveness of blood test); *United States* v. *Leon*, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring) (deterrent effect of exclusionary rule); Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 82-86. As in *Lockhart*, the fact that other courts have reached the opposite conclusion on precisely the same issue illustrates the difficulty in characterizing the trail court's conclusions as findings of adjudicatory fact.[19] Unless the legality of sobriety checkpoints is to be determined case-by-case

---

[19] In this case, the trial court dismissed as unpersuasive evidence based on Maryland's experience with sobriety checkpoints. Pet. App. 84a-92a. The Maryland Court of Appeals, however, found that much of the same material demonstrated that Maryland's sobriety checkpoint program "has been a moderately effective technique for detecting and deterring the drunk driver." *Little* v. *State*, 300 Md. 485, 479 A.2d 903, 913 (1984). The Maryland court found, accordingly, that the program was lawful.

Though a substantial majority of state courts has concluded that sobriety checkpoint programs are lawful if accompanied by appropriate safeguards, the courts have reached conflicting conclusions. Compare, *e.g.*, *Ingersoll* v. *Palmer*, 43 Cal. 3d 1321, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987); *People* v. *Bartley*, 109 Ill. 2d 273, 486 N.E.2d 880, cert. denied, 475 U.S. 1068 (1985); *People* v. *Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984);

(or stop-by-stop, to the extent individual defendants seek to litigate the matter in criminal trials), this Court should be able to examine all available justifications for sobriety checkpoints.

Notwithstanding the standard of review applied by the Michigan Court of Appeals, the issues before the Court are substantially legal in nature. The "reasonableness" of an enforcement technique, as opposed to its application in a particular situation, presents an issue of law. Cf., *e.g.*, *Terry* v *Ohio*, 392 U.S. 1, 20-27 (1968). Similarly, this Court's cases "provide guidance" on the assessment of the factors underlying such a judgment—the significance of a state interest, the effectiveness of the procedure at issue, and the intrusion on reasonable expectations of privacy. *Delaware v. Prouse*, 440 U.S. at 656-658. Those factors do not present unmixed questions of historical fact. Cf. *Cuyler* v. *Sullivan*, 446 U.S. 335, 341-342 (1980) .

In their analysis of the effectiveness of sobriety checkpoints, the Michigan courts failed to heed this Court's guidance in two critical respects. First, the primary basis for the state trial court's conclusion that sobriety checkpoints are ineffective, both in terms of actual arrests and deterrence, was its finding that only a small percentage of motorists who are stopped are arrested. Pet. App. 79a-83a, 95a. There is no dispute that the percentage of arrests is small, in keeping with the carefully limited nature of the stop and the fact that even during peak periods of alcohol consumption, when sobriety checkpoints are usually employed, only about 3% of the drivers on the road are intoxicated. See note 8, *supra*. However, it does

---

State v. *Deskins*, 234 Kan. 529, 673 P.2d 1174 (1973), with, *e.g.*, *State* v. *Kopell*, 127 N.H. 286, 499 A.2d 977 (1985); *State* v. *Smith*, 674 P.2d 562 (Okla. 1984). Most of the state decisions have been based on state constitutional grounds.

Adverse

not follow that checkpoints must therefore be considered unreasonable for purposes of the Fourth Amendment. This Court's cases have recognized that techniques resulting in far lower rates of detection may be "reasonable" measures. In *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384, 1394-1396 & n.3 (1989), the Court rejected the claim that the small number of positive drug tests resulting from a testing plan—5 out of 3600—required the plan's invalidation. The Court explained that "[t]he mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity." *Id.* at 1395.

Second, the trial court erred in finding sobriety checkpoints unreasonable because the State failed to show that "there are no permissible alternative means available to the police which advance the particular state concern." Pet. App. 75a; see *id.* at 96a-101a. The Court has never insisted on such a showing in determining whether a program involving a search or seizure is reasonable for purposes of the Fourth Amendment. In *Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. at 1419 n.9, the Court refused to invalidate a drug testing program based upon "a list of 'less drastic and equally effective means' of addressing the Government's concerns," explaining:

> We have repeatedly stated * * * that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." * * * It is obvious that "[t]he logic of such elaborate less-restrictive alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.

Accord, *e.g.*, *Colorado* v. *Bertine*, 479 U.S. 367, 373-375 (1987); *Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983); *United States* v. *Martinez-Fuerte*, 428 U.S.

at 556-557 n.12; *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973).

This Court's precedents do not require a promising means of reducing drunk driving to be accompanied by a showing, before the program has even been put into effect, that "there is no practical alternative means available to the State to advance its interest other than by implementing sobriety checkpoints." Pet. App. 96a. Here, implementation of a pilot program of sobriety checkpoints was based upon the considered recommendation of the Michigan Drunk Driving Task Force, a recommendation entirely in keeping with the conclusions of NHTSA, the President's Commision on Drunk Driving, the National Transportation Safety Board, and, more recently, the Surgeon General's Workshop on Drunk Driving. Under these circumstances, "[a]t bottom, [an] insistence on less drastic alternatives would require [the Court] to second-guess [their] reasonable conclusions." *Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. at 1419 n.9.

B. Sobriety Checkpoints Intrude Only Minimally On Fourth Amendment Interests

A number of features of sobriety checkpoints render their intrusion on Fourth Amendment interests minimal. Each motorist's brief stop at a sobriety checkpoint entails only a slight interference with his freedom of movement. Checkpoints are designed in various respects to be reassuring to law-abiding drivers. Finally, the checkpoints are conducted under strict guidelines that provide notice to the driver and restrict the discretion of law enforcement officers in the field, two of the principal functions served by a warrant in other settings. See *New York* v. *Burger*, 482 U.S. 691, 703 (1987). In these circumstances, the trial court's conclusion that Michigan's sobriety

checkpoints "have a significant subjective intrusive impact on a person's liberty interest" (Pet. App. 119a) cannot be reconciled with this Court's cases.

1. As the Court has repeatedly observed, an individual's "expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *United States* v. *Martinez-Fuerte*, 428 U.S. at 561. See *South Dakota* v. *Opperman*, 428 U.S. 364, 367-376 (1976); *United States* v. *Ortiz*, 442 U.S. 891, 896 n.2 (1975); *Cady* v. *Dombrowski*, D13 U.S. at 440-441. The "practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." *United States* v. *Martinez-Fuerte*, 428 U.S. at 560-561 n.14. See W. LaFave, *Search and Seizure* § 10.8 (2d ed. 1987).

In keeping with that practice, a motorist's expectation of free passage is at its most limited with respect to stops for the purpose of enforcing highway safety laws. See *New York* v. *Class*, 475 U.S. 106, 112-114 (1986). In principle, there appears to be no difference between the routine practice of stopping trucks at checkpoints to determine whether their weight or brakes constitute a danger to highway safety and stopping cars briefly to determine whether the driver is intoxicated.

This is not a case in which stops are designed to further criminal investigations unrelated to the operation of a vehicle. Cf. *United States* v. *Brignoni-Ponce*, 422 U.S. at 883 n.8; *id.* at 887-888 (Rehnquist, J., concurring); *Cady* v. *Dombrowski*, 413 U.S. at 440-441. For that reason, the trial court erred in characterizing sobriety checkpoint stops as "go[ing] beyond the traditionally recognized reasons for stopping motorists in their cars" and as designed to "search for violators of criminal law" or for "in-

vestigating purposes." Pet. App. 110a, 114a, 115a. It is a crime to bring a gun or a bomb aboard an airliner, but it would nevertheless be unfair to characterize a routine gate check at an airport as a "search for violators of criminal law" (Pet. App. 110a) or a criminal investigation. See *Ingersoll* v. *Palmer*, 43 Cal. 3d at 1330-1331, 743 P.2d at 1306; cf. *Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. at 1421 (permitting the government to take "necessary and reasonable regulatory steps" to prevent or deter hazardous behavior that, in some instances, is also criminal). In any event, in *Martinez-Fuerte*, the Court approved checkpoints in the vicinity of the border to detect illegal immigration even though smugglers who were apprehended were "routinely prosecute[d]." 428 U.S. at 553 n.9; see *id.* at 560 n.14 (discounting the relevance, for purposes of weighing a law's intrusiveness, of its "administrative," as opposed to criminal, purpose).

2. In *United States* v. *Martinez-Fuerte*, 428 U.S. at 557, this Court found that fixed checkpoints used to check immigration documents involved a "quite limited" intrusion on Fourth Amendment interests. Checkpoints of the type at issue here are no more intrusive, in constitutional terms, than those at issue in *Martinez-Fuerte*. The "objective intrusion" caused by a sobriety checkpoint consists of "only a brief detention of travelers" (*id.* at 558)—judging from the experience with the only checkpoint operated under Michigan's guidelines, 25 seconds or less for the average motorist (Pet. App. 6a). "All that is required of the [motorist] is a response to a brief question or two * * *." See *United States* v. *Brignoni-Ponce*, 422 U.S. at 880; *United States* v. *Martinez-Fuerte*, 428 U.S. at 558; Pet. App. 162a-163a. Thus, as the trial court acknowledged, stops at checkpoints intrude

only minimally on a motorist's freedom of movement. Pet. App. 104a.

3. Sobriety checkpoints, like the checkpoints at issue in *Martinez-Fuerte*, are also established and operated in a manner that minimizes any tendency to engender "concern or * * * fright." See 428 U.S. at 558. For instance, Michigan's guidelines require that checkpoints be established at locations that are well-lit and that signs clearly advise motorists that they are entering a sobriety checkpoint. See Pet. App. 108a, 152a-153a. Motorists see "that other vehicles are being stopped," and signs, cones, and uniformed officers provide "visible evidence, reassuring to law-abiding motorists, that the checkpoints are duly authorized and believed to serve the public interest." *United States* v. *Martinez-Fuerte*, 428 U.S. at 558, 559.[20] Indeed, this Court in *Delaware* v. *Prouse* strongly hinted that such checkpoints are lawful, when it noted the constitutionally significant distinction between "sporadic and random stops of individual vehicles" on the one hand and "those stops oc-

[20] The trial court idenitfied several features of sobriety checkpoints that it believed increase their intrusiveness—the fact that they are "transitory," rather than at fixed locations, and the fact that motorists will not be made aware of their opportunity to avoid the checkpoints. These circumstances provide no substantial basis for distinguishing this Court's assessment of the intrusiveness of the checkpoints at issue in *Martinez-Fuerte*. Consistent with the sobriety checkpoints' purpose of deterring drunk driving, the guidelines provide that "[a]n integral aspect of the pilot program will be to publicize the deployment of sobriety checkpoints to attain maximum public awareness." Pet. App. 145a. That publicity, together with signs and word of mouth, would undoubtedly suffice to give most motorists notice of the nature and purpose of sobriety checkpoints at least equivalent to that available in *Martinez-Fuerte*. A motorist's theoretical opportunity to avoid the checkpoints at issue in *Martinez-Fuerte* does not appear to have been a significant factor in this Court's assessment of their intrusiveness. Indeed, the Court noted that checkpoints in the vicinity of the border "operate on a coordinated basis designed to avoid circumvention by smugglers and others who transport the illegal aliens." 428 U.S. at 552.

casioned by roadblocks where all vehicles are brought to a halt or near halt, and are subjected to a show of the police power of the community." 440 U.S. at 657. At such "traffic checkpoints," the Court noted, the motorist "can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Ibid.* (quoting *United States* v. *Ortiz*, 422 U.S. 891, 894-895 (1975)).

4. Finally, under a properly designed checkpoint program, like the one at issue here, the discretion of officers in the field is carefully constrained. Michigan's guidelines require sobriety checkpoints to be located in accordance with established criteria, approved by the Director of the Department of State Police. Pet. App. 148a. The guidelines prescribe that all vehicles are to be stopped and detail what is to be said to each motorist.[21] Pet. App. 157a-164a. Michigan's procedures expressly require a briefing during which "[u]niform officers at checkpoint locations are to be given instruction regarding the procedure to be folowed," including "the exact location of the sobriety checkpoint, legal considerations involved, the procedure to be followed in approaching a vehicle, the initial contact with its driver, and what to do in specific situations." *Id.* at 150a-151a. These procedures are more than sufficient to assure that each motorist's "reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Delaware* v. *Prouse*, 440 U.S. at 655, 661; see *Colorado* v. *Bertine*, 479 U.S. at 376-377 (Blackmun, J., concurring).[22]

[21] Other programs may require a fixed percentage of traffic—for instance, every fifth car—to be stopped or require officers to cease operations temporarily when appropriate to avoid a backup of traffic. In our view, because programs of that nature also constrain discretion, they are not constitutionally distinguishable from Michigan's program. See *Delaware* v. *Prouse*, 440 U.S. at 664 (Blackmun, J., concurring).

All of these factors—the limited expectation that motorists have in being free from stops to enforce traffic safety laws, the brief and limited nature of the initial stop, the State's effort to notify the public of sobriety checkpoints and to assure that they are surrounded by signs and indications of authority reassuring to average motorists, and the restraints on the exercise of discretion by officers in the field—taken together require the conclusion that sobriety checkpoints of the type at issue in this case intrude only very minimally on Fourth Amendment interests.

C. With Respect To Sobriety Checkpoints, The Balance Of Relevant Interests Justifies Brief Stops Without Individualized Suspicion

The singular importance of reducing drunk driving, the evident effectiveness of sobriety checkpoints in advancing that goal, and their limited intrusion on Fourth Amendment interests justify an exception to the Fourth Amendment's requirement of individualized suspicion. The effectiveness of sobriety checkpoints derives from their universal applicability; every driver knows that if he encounters a checkpoint he will be exposed to a brief examination for signs of intoxication. In this situation, the goal of reducing the incidence of the profoundly dangerous practice of drinking and driving gives rise to "spec-

[22] To be sure, officers at a sobriety checkpoint exercise judgment when they examine motorists for "articulable indications of intoxication"—"an odor of intoxicants about the driver, slurred speech, lack of physical coordination, unusual eye movements, disorientation, or other behavior commonly associated" with driving under the influence of drugs or alcohol. Pet. App. 155a. However, those judgments may be considered on an individual basis if challenged by a motorist who claims that there was an insufficient justification for any subsequent detention and search. In this facial challenge, the Court need not address the nature of the individualized suspicion needed for, for instance, a breath test or field sobriety tests.

ial needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable." *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987). See *Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. at 1414. That is true even though driving under the influence of alcohol is a crime; in *Skinner*, the Court determined that the fact that the possession of drugs is a crime did not divest the government of its authority to take reasonable regulatory steps to prevent or deter the hazard resulting from drug use. 109 S. Ct. at 1421. Moreover, the "important governmental interest furthered by the [checkpoints] would be placed in jeopardy by a requirement of reasonable suspicion," and "the privacy interests implicated by [sobriety checkpoints] are minimal," *Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. at 1417. This is a situation in which "the Government's need to discover * * * latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify" brief stops for the purpose both of removing intoxicated motorists from the road and deterring others from driving, *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. at 1392.

Sobriety checkpoint programs such as those at issue in this case do not exceed the limits that the Fourth Amendment imposes "to prevent arbitrary and oppresive interference by enforcement officials with the privacy and personal security of individuals." *United States* v. *Martinez-Fuerte*, 428 U.S. at 554. In place of a warrant and probable cause or individualized suspicion, sobriety checkpoint programs are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown* v. *Texas*, 443 U.S. at 51. See *United States* v. *Martinez-Fuerte*, 428 U.S. at 564-566. They do not, therefore, provide for seizures that are "unreasonable" within the meaning of the Fourth Amendment.

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

NOVEMBER 1989

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 282203 606

15

Supreme Court, U.S.
FILED
NOV 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1897

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

MICHIGAN DEPARTMENT OF STATE POLICE
and COL. R. T. DAVIS, Director of the
Michigan Department of State Police,

Petitioners,

v

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW and JACK WELBORN,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

JOINT APPENDIX

FRANK J. KELLEY
ATTORNEY GENERAL

LOUIS J. CARUSO
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General

PATRICK J. O'BRIEN
Assistant Attorney General
Attorneys for Respondents

MARK GRANZOTTO
Counsel of Record
One Kennedy Square, Suite 2204
Detroit, Michigan 48226
(313) 964-4720

DEBORAH L. GORDON
Attorney for Respondents
1600 Ford Building
Detroit, Michigan 48226
(313) 962-3784

WILLIAM C. GAGE
Attorney for Respondents
1818 Buhl Building
Detroit, Michigan 48226
(313) 963-8890

Petition for Certiorari Filed May 19, 1989
Certiorari Granted October 2, 1989

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1989

TABLE OF CONTENTS

CONTENTS OF APPENDIX TO PETITION FOR WRIT OR CERTIORARI

Page

Michigan Supreme Court Order
Dated February 22, 1989 ..... 1a

Michigan Court of Appeals Opinion
Dated August 1, 1988 ..... 2a

Wayne County Circuit Court Order
Dated June 24, 1986 ..... 26a

Wayne County Circuit Court Opinion
Dated July [sic] 24, 1986 ..... 28a

Michigan State Police Sobriety Checkpoint
Guidelines 133a

State Court Appellate Decisions Concerning
Roadside Sobriety Checkpoints 165a

CONTENTS OF JOINT APPENDIX

Chronological List of Relevant Docket Entries 1a

Complaint, Filed May 16, 1989
[Exhibits have been omitted]..... 2a

Answer, Filed May 27, 1989 ..... 14a

Evidentiary Hearing Exhibits:

Michigan Drunk Driving Task Force Final Report
(Defendants' Exhibit 3, admitted Vol I, p 113) 19a

Evidentiary Hearing Transcript References:

H. Laurence Ross	Vol I, pp 8–55.....	38a
Gerald L. Hough	Vol I, pp 72–73, 82–86, 94–96, 125, 141	75a
William H. Hackel	Vol I, pp 143–159.....	83a
Thomas M. Edmonds	Vol I, pp 159–176.....	96a
Robert Ficano	Vol I, pp 176–186.....	110a
Raymond Cotton	Vol II, pp 36, 57–58, 65–66...	118a
William Slaughter	Vol III, pp 104–112	120a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Wayne County Circuit Court No. 86-613063

5/16/86	Complaint filed
5/29/86–6/3/86	Evidentiary Hearing
6/24/86	Opinion and Order filed

Michigan Court of Appeals No. 93823-F

7/11/86	Claim of Appeal filed
7/27/87	Oral argument; case submitted to panel
8/1/88	Opinion filed

Michigan Supreme Court No. 83992

8/22/88	Application for Leave to Appeal filed
1/17/89	Brief in Opposition filed
2/22/89	Order denying application filed

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN, **Plaintiffs,** **v** **THE MICHIGAN DEPARTMENT OF STATE POLICE and GERALD L. HOUGH, Director of the Michigan State Police,** **Defendants.**	**C.A. No. 86- -**

ACLU FUND OF MICHIGAN
BY: DEBORAH L. GORDON (P27058)
STARK AND GORDON
1600 Ford Building
Detroit, Michigan 48226
(313) 962-3784

MARK R. GRANZOTTO (P31492)
1150 First National Bldg.
Detroit, Michigan 48226
(313) 964-3430

Cooperating Attys. for Plaintiffs

THOMAS GILES KAVANAGH (P15766)
Of Counsel for Plaintiffs
26557 Woodward Avenue
Huntington Woods, MI 48070
(313) 542-9910

COMPLAINT

There is no other civil action between these parties arising out of the same transaction of occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed after having been assigned to a judge. See MCR (1985) 2.113(C).

NOW COME the Plaintiffs, by and through their attorneys, **Stark and Gordon,** and **Mark R. Granzotto,** cooperating attorneys with the **ACLU Fund of Michigan,** and complain against Defendants as follows:

INTRODUCTION

1. Plaintiffs seek an immediate temporary restraining order and subsequent preliminary injunctive and declaratory relief enjoining Defendants from violating their constitutional and civil rights to be free from unreasonable search and seizure pursuant to the Fourth and Fourteenth Amendments to the United States Constitution and Article I, §11 of the Michigan Constitution of 1963, as well as their right to be free from action on the part of Defendant, **Michigan Department of State Police,** which will occur without sufficient statutory authority or without appropriate promulgation of rules pursuant to state common law, MCLA §24.201 *et seq.*

PARTIES

2. Plaintiff, **Rick Sitz,** is a licensed driver in the State of Michigan, residing in the City of Taylor, County of Wayne, who regularly travels throughout the State in his automobile.

3. Plaintiff, **Joseph F. Young, Sr.,** is a licensed driver in the State of Michigan, residing in the City of Detroit, County of

Wayne, who regularly travels throughout the State in his automobile.

4. Plaintiff, **Dominic J. Jacobetti,** is a licensed driver in the State of Michigan, residing in the City of Negaunee, County of Marquette, who regularly travels throughout the State in his automobile.

5. Plaintiff, **Dick Allen,** is a licensed driver in the State of Michigan, residing in the City of Fairgrove, County of Tuscola, who regularly travels throughout the State in his automobile.

6. Plaintiff, **Keith Muxlow,** is a licensed driver in the State of Michigan, residing in the City of Brown City, County of Sanilac, who regularly travels throughout the State in his automobile.

7. Plaintiff, **Jack Welborn,** is a licensed driver in the State of Michigan, residing in the City of Kalamazoo County of Kalamazoo, who regularly travels throughout the State in his automobile.

8. Defendant, **Michigan Department of State Police** (hereinafter Defendant **State Police**), is a governmental unit of the State of Michigan, located at 1200 Sixth Avenue, Detroit, Michigan, which exercises or may exercise its authority on a statewide basis, including in the County of Wayne.

9. Defendant, **Gerald L. Hough,** who has an office at 1200 Sixth Avenue, Detroit, Michigan, is Director of the Michigan Department of State Police, and is sued in his official capacity.

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to MCLA §600. 605 and 42 U.S.C. §1983.

11. Venue is proper in this Court pursuant to MCLA §600. 1615.

12. The roadblocks complained of herein as announced by the Michigan State Police on May 1, 1986 will encompass the County of Wayne, State of Michigan.

FACTUAL ALLEGATIONS

13. On May 1, 1986, Colonel Gerald L. Hough, Director of the Michigan State Police, announced in a press briefing in Detroit, Michigan that the Michigan Department of State Police will begin to implement and operate what he referred to as "sobriety checkpoints" (hereinafter "roadblocks") during May, 1986 **[Exhibit A].**

14. In February of 1986, Defendant **State Police** issued a draft copy of "Sobriety Checkpoint Guidelines" setting forth, in pertinent part, the "Goals and Objectives", "Policies and Procedures," "Program Design," "Implementation Guidelines" and "Program Implementation," with regard to the roadblocks **[Exhibit B].**

15. Said roadblocks will be set up in any and/or all counties in the State of Michigan at "selected locations" **[Exhibit B, p. 4].**

16. The alleged purpose of the roadblocks is to "monitor traffic for driver sobriety" **[Exhibit B, p. 4].**

17. According to the Michigan Department of State Police, "every driver is potentially subject to being stopped" **[Exhibit B, p. 2]**.

18. As specifically described in **Exhibits A** and **B** attached hereto, the aforementioned roadblocks will entail police stops, investigations, searches and seizures *not* based upon probable cause to believe that a driver has committed or is committing any crime and conducted without a warrant.

19. Specifically, the stops, investigations, searches and seizures will encompass, in part, the following:

"All traffic approaching the checkpoint will be stopped as long as traffic congestion does not occur. A uniformed police officer will approach the motorist and state, 'I am Trooper (Officer) _____ of the Michigan State Police (local police department). You have been stopped at a sobriety checkpoint set up to identify intoxicated drivers.' If there is no immediate evidence of intoxication, a traffic safety brochure developed specifically for this enforcement strategy will be given to the motorist.

"During the brief stop the officer will look for articuable signs, such as an odor of alcohol about the driver, slurred speech, the general appearance, and other behavior normally associated with OIUL or OUID violators. If, according to the officer, there is sufficient probable cause to believe the person is driving under the influence, the driver will be detained, asked for his or her driver's license, and directed to a predetermined 'safe area' for further investigation and psycho-motor coordination tests. If the situation warrants, the driver will be asked to submit to a preliminary breath test; and if sufficient evidence of intoxication is observed, the driver will be arrested.

"The line officer is to stay with the driver from initial contact to the arrest. When the officer leaves the line, he is to be replaced by another officer-in-waiting. If no reserve officers are available, the line is to continue until such time the remaining officers can no longer efficiently and safely handle the traffic presented.

"Decisions regarding pursuit or other actions to be taken in the event of unusual problems occurring in conjunction with checkpoint operations shall be made by the commissioned officer in charge at the scene." **Exhibit B,** ***Program Implementation***, pp. 12–13.

COUNT I

20. Plaintiffs repeat and reallege ¶¶1–19 above with the same force and effect as though set forth in full herein.

21. The previously described stops and investigations constitute a search and seizure subject to Article I, §11 of the Michigan Constitution of 1963.

22. Plaintiffs have a right to be free from unreasonable searches and seizures pursuant to Article I, §11 of the Michigan Constitution.

23. The searches and seizures described above will occur without probable cause to believe that Plaintiffs have committed or are committing a crime and without a warrant, and, as such, are violative of Plaintiffs' rights pursuant to Article I, §11 of the Michigan Constitution.

COUNT II

24. Plaintiffs repeat and reallege ¶¶1–22 above with the same force and effect as though set forth in full herein.

25. The previously described stop and investigation constitutes a search and seizure subject to the Fourth and Fourteenth Amendments of the United States Constitution (*Delaware* v *Prouse*, 440 US 648 (1979)).

26. Plaintiffs have a right to be free from unreasonable searches and seizures pursuant to the Fourth and Fourteenth Amendments of the United States Constitution.

27. The searches and seizures described above will occur without probable cause to believe that Plaintiffs have committed or are committing a crime and without a warrant, and, as such, are violative of Plaintiffs' rights pursuant to the Fourth and Fourteenth Amendment of the United States Constitution.

28. The roadblocks in the "Sobriety Checkpoint Guidelines" have been planned and will be implemented and supervised as part of the official policies, practices, customs and alleged rules of Defendant **Michigan Department of State Police,** and have been set forth under color of state law.

29. The roadblocks and "Sobriety Checkpoint Guidelines" described aforesaid have been planned and will be supervised and implemented by those acting within the scope of their official capacities.

30. Defendant **Gerald Hough,** has planned and will supervise and implement said roadblocks while acting within the scope of his official authority as Director of the Michigan State Police.

31. The aforesaid roadblocks and "Sobriety Checkpoint Guidelines" have been planned and will be supervised and implemented with intentional and deliberate disregard for the civil and constitutional rights, privileges and sensibilities of the Plaintiffs, including their fundamental right to be free from unreasonable search and seizure arising out of the Fourth and Fourteenth Amendments to the United States Constitution.

32. By planning, implementing and supervising the aforesaid roadblocks and "Sobriety Checkpoint Guidelines," Defendant **Hough,** in his capacity as official agent, representative and employee of Defendant **Michigan Department of State Police** has unlawfully violated Plaintiffs' aforesaid civil and constitutional rights.

33. The acts described aforesaid are in excess of any authority granted them by law and are without justification or excuse in law.

COUNT III

34. Plaintiffs repeat and reallege ¶¶1–33 above with the same force and effect as though set forth in full herein.

35. There is no statutory authority which authorizes or empowers Defendants to take the action complained of herein.

36. The statutory authority to operate such roadblocks relied upon by Defendants in its "Sobriety Checkpoint Guidelines" **[Exhibit B]** is MCLA §257.715(2), part of the Michigan Vehicle Code. However, this statute is inapplicable in that it specifically directs itself to maintenance of equipment on motor vehicles and inspection for defects in equipment,

and does not apply to the type of stops, inspections, searches and seizures that Defendants intend to implement.

37. The Michigan Department of State Police is subject to the provisions of the Administrative Procedures Act, **MCLA §24.201** *et seq.* with regard to its rule making authority.

38. A "rule" is defined by MCLA §24.207 as:

> "An agency regulation, standard, policy, ruling or instruction of general applicability, which implements or applies law enforced or administered by the agency, or which prescribes the organization, procedure or practice of the agency."

39. The draft "Sobriety Checkpoint Guidelines" **[Exhibit B]** set forth by the Michigan Department of State Police are "rules" for purposes of MCLA §24.201 *et seq.*

40. Defendants have not followed the procedure set forth in MCLA §24.201 *et seq.* with regard to properly promulgating and adopting the rules governing the implementation of the roadblock searches described aforesaid.

41. Moreover, the roadblock searches and seizures and the "Sobriety Checkpoint Guidelines" Defendants rely upon as set forth in **Exhibit B** are outside the matters governed by the Michigan Department of State Police enabling statute, MCL §28.1 *et seq.*

42. The rules Defendants seek to implement are arbitrary, unreasonable and in excess of the rule making power and authority of the Michigan Department of State Police.

43. The rules Defendants seek to implement constitute an abuse of discretion on the part of Defendants.

44. The Michigan Department of State Police has clearly manifested an intention to implement the rules beginning in May, 1986 **[Exhibits A and B]**.

45. It would be a vain and useless act for Plaintiffs to attempt to have the rules revoked administratively in that (a) the rules are not capable of revocation because they have never been adopted; and (b) Defendants have clearly manifested an intention to immediately begin implementing the rules in May of 1986.

HARM

46. Plaintiffs repeat and reallege ¶¶1–45 above with the same force and effect as though set forth in full herein.

47. The implementation by Defendants of the roadblock stops and searches as described aforesaid will cause Plaintiffs to suffer immediate and irreparable injury, harm, loss and damage in that their constitutional rights will have been violated and they will be subjected to unconstitutional, arbitrary and unreasonable action by Defendants without Defendants having obtained the appropriate statutory and/or administrative authority to so act.

48. Plaintiffs have no adequate remedy at law.

49. The immediate issuance of a temporary restraining order and subsequent issuance of preliminary injunction and declaratory relief will maintain the status quo.

50. The immediate issuance of a temporary restraining order and subsequent issuance of preliminary injunctive and declaratory relief will serve the public interest.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request the following:

a) That this Court issue an immediate temporary restraining order which shall remain in effect until such time as this Court can conduct a full hearing on Plaintiffs' Motion for Preliminary Injunctive and Declaratory Relief, enjoining Defendants, their agents, representatives and employees from implementing the roadblocks as described aforesaid in **Exhibits A** and **B.**

b) That this Court set this matter for immediate hearing on Plaintiffs' Motion for Preliminary Injunctive and Declaratory Relief.

c) That this Court enjoin Defendants, their agents, representatives and employees from instituting the roadblocks described aforesaid and declare that the roadblocks described aforesaid are unconstitutional and violative of Plaintiffs' federal and state constitutional, statutory and common law rights.

d) That this Court grant Plaintiffs such other and further equitable or other relief to which they are deemed to be entitled, including costs and attorneys' fees.

Respectfully submitted,

ALCU FUND OF MICHIGAN BY:

/s/ Deborah L. Gordon
DEBORAH L. GORDON (P27058)
STARK AND GORDON
1600 Ford Building
Detroit, Michigan 48226
(313) 962-3784

/s/ Mark H. Granzotto
MARK R. GRANZOTTO (P31492)
1150 First National Bldg.
Detroit, Michigan 48226
(313) 964-3430

Cooperating Attys. for Plaintiffs

Dated: May 16, 1986

OF COUNSEL FOR PLAINTIFFS:

Thomas Giles Kavanagh (P15766)
26557 Woodward Avenue
Huntington Woods, MI 48070
(313) 542-9910

(Title omitted in printing)

ANSWER TO COMPLAINT

NOW COMES the Defendants, by and through their attorneys, Attorney General FRANK J. KELLEY, and Assistant Attorney General, Patrick J. O'Brien, and answers the complaint as follows:

1. Denied.

2. Neither admit nor deny for lack of sufficient knowledge, but leave Plaintiffs to their proofs.

3. Neither admit nor deny for lack of sufficient knowledge, but leave Plaintiffs to their proofs.

4. Neither admit nor deny for lack of sufficient knowledge, but leave Plaintiffs to their proofs.

5. Neither admit nor deny for lack of sufficient knowledge, but leave Plaintiffs to their proofs.

6. Neither admit nor deny for lack of sufficient knowledge, but leave Plaintiffs to their proofs.

7. Neither admit nor deny for lack of sufficient knowledge, but leave Plaintiffs to their proofs.

8. Admit.

9. Admit.

10. Neither admit nor deny for the reason paragraphs state legal conclusions and no factual allegations.

11. Neither admit nor deny for the reason paragraphs state legal conclusions and no factual allegations.

12. Neither admit nor deny for lack of specificity of allegations, but leave Plaintiffs to their proofs.

13. Neither admit nor deny for the reason Exhibit A is a document which speaks for itself and needs no interpretation, but leave Plaintiffs to their proofs.

14. Neither admit nor deny for the reason Exhibit B is a document which speaks for itself and needs no interpretation, but leave Plaintiffs to their proofs.

15. Neither admit nor deny for lack of specificity of allegations, but leave Plaintiffs to their proofs.

16. Neither admit nor deny for lack of specificity of allegations, but leave Plaintiffs to their proofs.

17. Neither admit nor deny for lack of specificity of allegations, but leave Plaintiffs to their proofs.

18. Neither admit nor deny for lack of specificity of allegations, but leave Plaintiffs to their proofs.

19. Neither admit nor deny for lack of specificity of allegations, but leave Plaintiffs to their proofs.

COUNT I

20. Adopt by reference the answers to paragraphs 1 through 19 above as though set forth in full herein.

21. Neither admit nor deny for the reason paragraph 21 states legal conclusions, any factual allegations are denied.

22. Neither admit nor deny for the reason paragraph 22 states legal conclusions, any factual allegations are denied.

23. Neither admit nor deny for the reason paragraph 23 states legal conclusions, any factual allegations are denied.

COUNT II

24. Adopt by reference the answers to paragraphs 1 through 22 above as though set forth in full herein.

25. Neither admit nor deny for the reason paragraph 25 states legal conclusions, any factual allegations are denied.

26. Neither admit nor deny for the reason paragraph 26 states legal conclusions, any factual allegations are denied.

27. Denied.

28. Neither admit nor deny for lack of specificity of allegations, but leave Plaintiffs to their proofs.

29. Neither admit nor deny for lack of specificity of allegations, but leave Plaintiffs to their proofs.

30. Neither admit nor deny for lack of specificity of allegations, but leave Plaintiff's to their proofs.

31. Denied.

32. Denied.

33. Denied.

COUNT III

34. Adopt by reference the answers to paragraphs 1 through 33 above as though set forth in full herein.

35. Denied.

36. Denied.

37. Neither admit nor deny for the reason paragraph 37 states a legal conclusion.

38. Neither admit nor deny for the reason paragraph 38 quotes MCL 24.207 and no answer is required.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Adopt by reference the answers to paragraphs 1 through 45 above as though set forth in full herein.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

AFFIRMATIVE DEFENSES

Plaintiff has failed to state claims upon which relief can be granted.

The answering Defendants at no time violated Plaintiffs' constitutional rights under Article I, §11 of the Michigan Constitution or the Fourth and Fourteenth Amendments of the United States Constitution.

The answering Defendants properly developed procedures and implemented sobriety checklanes within the statutory authority of the Michigan Department of State Police under the statutes relating to regulation of vehicles operated on the public highways of this state.

WHEREFORE, Defendants respectfully request that the Court dismiss the Complaint and deny the relief requested.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Patrick J. O'Brien (P 27306)
Assistant Attorney General
Executive Division
7th Floor, Law Building
525 West Ottawa
Lansing, Michigan 48913
(517) 373-8060

Dated:

FINAL REPORT
SEPTEMBER 1985

MICHIGAN DRUNK DRIVING TASK FORCE

FINDINGS AND RECOMMENDATIONS

POLICY RECOMMENDATIONS

PROBLEM 1: Michigan's drunk driving laws specify that motorists can be penalized by two jurisdictions, the courts and the Department of State. When district courts suspend or revoke licenses for drunk driving, no appeal for relief to circuit courts is permitted. However, when the Department of State suspends a license for driver's refusal to take the breathalyzer test, the penalty is appealable to a circuit court. An overwhelming number of drivers are successful when they appeal the department's punishment to circuit courts. This practice weakens the drunk driving laws.

RECOMMENDATION 1: The Task Force recommends that license suspension and revocations by the Department of State no longer be appealable to circuit courts.

PROBLEM 2: Under the current system, fines collected by courts are not being used to alleviate the problems of drinking drivers. Costs imposed remain with the court, but fines are routed to the State Library Fund.

RECOMMENDATION 2: The Task Force recommends that the fines being collected on drinking and driving offenses be used to remedy the problems of drinking and driving through highway safety programs.

PROBLEM 3: Once the officer has probable cause to make

a drunk driving arrest, he can charge the driver with OUIL and invoke the implied consent law to require an evidentiary test. This generally means transporting the offender to the police station for final processing. At this stage of the arresting process, the officer must fill out several forms, many of which contain duplicate information. The information contained in the forms is either used at different locations within the system or for various purposes at the arresting site. These intricacies and time-consuming steps in making an arrest seem to have an adverse effect on the officer's desire to enforce the drunk driving laws. The time consumed in completing duplicate paperwork could better be used by the officer returning to the patrol area to make additional arrests. To further compound the delays at this level, a number of police agencies administer breath tests at one location and lodge the offender at a different location. In addition to the transportation time involved, more forms must be completed. Some departments even require the arresting officer to transport the arrestee to another location for bonding, if allowed, before arraignment. It was also noted that some police departments are causing delays because they are of the opinion that their department must obtain a certified driving record to accompany the arrestee to court. However, most courts are using LEIN printouts which eliminates this type of delay.

RECOMMENDATIONS 3: 1. **FORMS REDUCTION:** Devise a single form which would contain all the necessary information pertinent to the arrest. The form should contain the essential elements necessary to obtain a warrant, and should be standardized by all courts throughout the state. Photo copies can be supplied to other agencies who have a need for this information.

2. **COMBINE TESTING AND LODGING LOCATION:** Place breath testing equipment and certified operators at all

lodging locations in the state. The cost of testing should be determined and assessed to the proper agency.

3. **ADMISSIBILITY OF LEIN PRINTOUTS:** Provide for admissibility of LEIN printouts for court use and require certified driving records only in those cases where recent activity on the offender's driving record requires closer scrutiny.

PROBLEM 4: Relatively few delays occur at the prosecution level, however, some delays are prevalent in many prosecutors' offices due to staffing problems. In those locations, the increased workload brought on by increased arrests and requests for trial have not been supported by a sufficient number of attorneys to handle the increase. Other delays are caused by not having attorneys available at the time when most requests for warrants are made. A further delay noted was due to a lack of training in the prosecution of OUIL cases. A particular problem is the fact that a significant number of OUIL cases are being plea bargained to a lesser offense.

RECOMMENDATION 4: 1. **INCREASE STAFF:** Hire more attorneys in those offices presently understaffed.

2. **INCREASE TRAINING:** Conduct special schools for prosecuting OUIL cases.

3. **INCREASE PAY AND ACCOUNTABILITY:** Prosecutors should be better compensated but should also be held responsible for cases reduced to a lesser offense.

4. **INCREASE OFFICE HOURS:** Maintain hours during those periods of increased need for the purpose of preparing the legal papers or to advise the arresting officer as to needed proofs.

5. **MERIT INCREASE:** Grant incentive increases based on the attorney's ability to prosecute OUIL cases.

PROBLEM 5: Delays in the above categories can be measured in terms of minutes, hours, and often days. However, at the judicial level the delays are measured in terms of several days and months. Some of the delays are unavoidable because of the formal nature of the system. However, many delays are planned because they tend to benefit the courts, defendant, prosecution, or defense counsel. Even though these tactics may relieve pressure at one point by relaxing activities at another, in some cases, the overall outcome may be the nullification of the intended effect of the law.

RECOMMENDATION 5: 1. **INCREASE STAFF:** Hire more trained personnel in those areas which are experiencing a legitimate backlog.

2. **DETER BENEFITS ACHIEVED BY DELAY TACTICS:** Restructure sanctions so that the sentence for a guilty plea taken at arraignment is identical upon conviction at trial.

3. **THE LENGTH OF SUSPENSION** and the points against the driving record must also remain and not be bargained to a lesser charge.

PROBLEM 6: The process of screening and assessment, while being a very essential ingredient to a successful drunk driving prevention program, has also become one of the most common causes of lengthy delays. Delays are most prevalent where the courts are using screening agencies that are not properly staffed to meet the time constraints. These agencies may be either in-house service or an outside agency. Generally, the courts desire to retain the screening and assessment funds by using probation offices to complete

this task. However, many probation departments do not have sufficient personnel available to perform the screening and assessment requirements. In those jurisdictions properly staffed, the use of probation officers is very successful which seems to indicate that a sufficiently staffed agency must be maintained to comply with schedule demands and eliminate delays.

RECOMMENDATION 6: The Task Force recommends legislation earmarking funds realized by probation departments from screening and assessment be used for hiring and training probation officers.

PROBLEM 7: Another delay affecting a few courts is the res gestae rule which requires the prosecution to produce all res gestae witnesses. Some judges have interpreted this rule, which applies to felony cases, to apply to misdemeanor cases such as OUIL. This ruling causes delays and in some cases results in dismissal when prosecution is unable to produce all res gestae witnesses.

RECOMMENDATION 7: Since the rule is only affecting a small number of courts, they should relax the requirement and allow the case to proceed as is done in the majority of courts.

PROBLEM 8: Throughout the state of Michigan there is uniform administration of chemical tests and preliminary breath tests by police agencies. Only in the area of field sobriety tests to the roadside testing methods vary greatly among the agencies. Some of the tests used are not effective tools for the officer to determine the driver's level of intoxication. The National Highway Traffic Safety Administration has studied the use probability of detecting drivers with lower BAC. This three-part test consists of the horizontal gaze nystagmus test, walk-and-turn, and the one-leg stand.

The lack of uniform field sobriety testing is also a factor toward ineffective prosecution of Michigan drunk driving laws. Often the defendant's original charge is reduced or dismissed because of the method used or the numerous methods used within the same agency.

RECOMMENDATION 8: The Task Force recommends that all traffic law enforcement agencies in the state of Michigan consider the use of horizontal gaze nystagmus test, walk-and-turn, and the one-leg stand as part of their battery of tests.

PROBLEM 9: Given the current dimensions of jail overcrowding, even short sentences represent monumental pressure for county correctional facilities and staff. Public Act 310 of 1982 specifically authorized and use of community service programs as an alternative to incarceration to alleviate some of the pressure on the overtaxed institutions. A proposed 1985 amendment to this act (SB 123) makes mandatory a 48-hour jail sentence or 10 hours of community service for drunk driving offenders. The Task Force anticipates an increased use of community service programs throughout the state because of this recent change.

RECOMMENDATION 9: The Task Force recommends that local communities utilize the model community service program developed by the Task Force (See Appendix K) for developing their local programs.

PROBLEM 10: As a result of Michigan's overcrowded state detention facilities, many county facilities are also now affected. Alternative detention facilities are also now affected. Alternative detention facilities may be used to alleviate this overcrowding problem. This concept is being used in certain communities within the state which may serve as a model for other communities considering alternative detention facilities.

RECOMMENDATION 10: The Task Force recommends that communities utilize the contract agreement between the County of Wayne and the Volunteers of America (See Appendix L) as a model for developing an alternative detention facility.

PROBLEM 11: While most motorists agree that our highways need to be safe for all transportation purposes, there is disagreement on what role government should play in enforcing existing laws or enacting new ones. The Task Force has proposed several general deterrent measures, and the public may be reluctant to accept such new measures.

RECOMMENDATION 11: The Task Force recommends that long-term coordinated public education campaigns regarding enforcement and general deterrent measures be developed.

PROBLEM 12: At the present time there is a discrepancy in the reporting of jail time by various courts. In some courts jail time is reported only if the convicted subject is ordered to serve time following sentencing. In other courts every convicted subject who was placed in custody at time of arrest is reported as receiving a jail sentence even though it is only for the period of the custodial arrest.

RECOMMENDATION 12: The Task Force recommends that the Department of State, District Judges Association and the District Court Administrators Office establish a uniform policy of reporting jail time. It also recommends that this policy result in jail time being reported only in those cases where the convicted subject is required to physically serve time in jail following sentencing or in addition to the custodial arrest.

PROBLEM 13: When a conviction for an offense of OUIL,

OWI, or related charge is reported to the Department of State, there is no indication as to which penalty level (1st, 2nd, or 3rd offense) the individual was sentenced. This causes incomplete and inaccurate analysis of the penalty phase.

RECOMMENDATION 13: The Task Force recommends that the Department of State institute a new series of codes for use on the abstract of conviction which would distinguish convictions under the various penalty levels.

PROBLEM 14: A major problem confronting the various groups and organizations involved with the drinking driver problems (from a public information perspective) is the lack of any sort of comprehensive plan or strategy for public information and education (PI&E) programs and activities. The results, thus far, have been the continuous proliferation of a wide variety of different programs, events, and campaigns throughout the year, aimed at various "target audiences" and sponsored by well-meaning groups but with little or no evidence of coordination with other programs.

RECOMMENDATION 14: Develop a long-term strategy for implementation of a comprehensive PI&E plan (i.e., based on research such as that recently completed at Michigan State University by Dr. Charles Atkin.)

PROBLEM 15: Currently, offender failure to comply with rehabilitation and treatment recommendations made at the time of sentencing is not a factor in reissuance of a driver license. Therefore, the offender who has been identified by the courts as needing rehabilation may be re-licensed without the necessary intervention services which may positively impact on recidivism.

The Office of Substance Abuse Service has experienced difficulty in determining if the courts are following through with screening and assessment recommendations, and whether the drunk drivers actually attend recommended programs. The Department of State currently collects this information from abstracts submitted by the courts.

RECOMMENDATION 15: The Task Force recommends that a reporting system be established to assure that individual offenders assigned to education and treatment services, in fact, comply with the assignments, and to make information on compliance available to motor vehicle administration officials at the time of appearance for re-licensing. A written release from the sentencing court or other written evidence of compliance to the terms of sentence should be mandatory prior to license reissuance.

PROBLEM 16: There is a lack of consistency in the language used to describe drinking and driving issues. Unfortunately, these inconsistencies serve to perpetuate myths. For example, the drinking driver who violates the law should be referred to as a "problem drinker"" not a "social drinker."

RECOMMENDATION 16: The Task Force recommends that the glossary, which is included in Appendix C of this report, be used as a basis for standardization and that all professionals working in the area of substance abuse services, enforcement, and adjudication, use this language which is consistent with present information about problem alcohol and other drug use.

LEGISLATION RECOMMENDATIONS

PROBLEM 17: The Holmes Youthful Trainee Act (YTA) covers criminal offenses other than first-degree murder and

major drug crimes, and therefore, would include OUIL. The YTA permits a court to grant youthful training status to youths between their seventeenth and twentieth birthdays which does not constitute a criminal conviction. Another negative aspect is that YTA dispositions do not carry any sanctions for trainees who violate probation terms. Finally, the YTA precludes the Department of State from imposing administrative actions against the driver.

RECOMMENDATION 17: Therefore, the Task Force recommends legislation be adopted to exclude OUIL violations from the Youthful Trainee Act.

PROBLEM 18: The Task Force, in its *Interim Report*, recommended that the state of Michigan adopt a law requiring the use of seat belts. Public Act No. 1 of 1985 makes seat belt use mandatory in this state effective July 1, 1985.

RECOMMENDATION 18: The Task Force recommends strict enforcement of the mandatory seat belt law by all police departments in the state of Michigan.

PROBLEM 19: Many courts are not admitting into evidence the defendant's refusal of a breath test which often results in dismissal of the drunk driving charge.

RECOMMENDATION 19: The Task Force recommends that legislation be introduced making the refusal of a breath test admissible into evidence.

PROBLEM 20: The Michigan Motor Vehicle Code's current definition of "operator" does not include an intoxicated person arrested while asleep in a stationary vehicle with the motor running. As such, intoxicated persons arrested under the current definition have been successful in having the

charges dismissed because the current definition does not include them as an operator of a motor vehicle.

RECOMMENDATION 20: The Task Force recommends that the Motor Vehicle Code be amended to redefine "operator" to include this situation.

PROBLEM 21: In 1982 the Michigan Legislature, in Public Acts 309, 310, and 311, adopted significant reforms aimed at curbing death, injury, and property damage caused by drinking drivers. The Dram Shop Act makes a bar owner liable to the victims of a drunk driver's negligence only if the bar served a visibly intoxicated person. The House Liquor Control Committee is now considering HB 4550 which could have a negative effect on the drunk driving laws. The deterrence of drinking and driving must come from all those concerned and not just from criminal sanctions and law enforcement. Civil regulation with the threat of liability is an important tool in the combating of drinking and driving. The proposed amendments would limit all compensation to the injured party, no matter how serious the injury, and no matter how drunk the driver was when the bar owner served them.

RECOMMENDATION 21: The Task Force recommends that legislation tending to limit the bar owner's liability not be enacted. However, the Task Force would support such legislation if insurance coverage was made mandatory for all bar owners.

PROBLEM 22: A countermeasure that is purported to be effective in deterring people from driving drunk is the loss of the operator's license. Such a countermeasure is even more effective when the loss of the license is certain and immediate. Currently, in many cases a drunk driver retains possession of the license for extended periods of time, especially

while awaiting a jury trial, and in a number of cases the license is never relinquished. One method of achieving certain and immediate action is prompt license suspension for drivers who refuse the breath test or when tested have a BAC at or in excess of 0.10%. A police officer, acting as an agent for the Secretary of State, would take the operator's license in instances cited above and issue a temporary permit pending an appeal to the Department of State. A document entitled, "Swift and Sure Licensing Sanctions or Administrative Per Se Licensing Sanctions," was prepared as an example of how such a procedure might operate in the state of Michigan.

RECOMMENDATION 22: The Task Force recommends that the Legislature study the concept of an administrative per se driver license sanction for drunk drivers.

PROBLEM 23: There is presently no requirement for central reporting of drunk driving arrest information in Michigan. With over 700 police agencies and numerous prosecuting authorities on all drunk driving arrests, and impossible to devise a system to track the cases through each phase (arrest, prosecution, and disposition.)

RECOMMENDATION 23: The Task Force recommends that legislation be sought to mandate the central reporting of drunk driving related cases. This mandate should include reporting at each phase of the case.

PROBLEM 24: The Congress of the United States enacted legislation in 1982 that provides for alcohol highway safety incentive funds (Section 408) for states that meet certain criteria. Funding is available in a basic grant and a supplemental grant equivalent to 30 percent and 20 percent, respectively, of a state's fiscal year 1983 Section 402 Federal Highway Safety Fund apportionment. If Michigan was qualified for both grants, it would receive some $5.7 million over a three-year period which could help defray some of the costs for implementing Task Force recommendations. A state must qualify for the basic grant in order to be eligible for the supplemental grant. Currently 13 states have qualified for both the basic and supplemental grants. Michigan currently does not satisfy two of the four criteria for the basic grant. They are as follows:

1) The prompt suspension for a period of not less than 90 days for a first offender, and not less than one year for repeat offenders, of the driver's license of any individual who has committed an alcohol-related traffic offense, or who refuses to submit to a chemical test under a state's implied consent statute.

2) A mandatory sentence which shall not be subject to suspension or probation, of (1) imprisonment for not less than 48 consecutive hours, or (2) not less than ten days of community service of any person convicted of driving while intoxicated more than once in any five-year period. Michigan meets the requirements of criterion No. 1 except for "prompt suspension" which has been defined by the Congress as "an average of 45 days between arrest and sanction". "Imprisonment" has been defined by the Congress as confinement in jail, or an alternate detention facility, or inpatient treatment facility. The mandatory sentence would only apply to those convicted of second offense OUIL/UBAL (unlawful blood alcohol level.)

RECOMMENDATION 24: The Task Force recommends that the state of Michigan enact the necessary legislation to comply with the criteria for obtaining Section 408 alcohol highway safety funds.

EDUCATION AND TRAINING RECOMMENDATIONS

PROBLEM 25: In Michigan, children are being taught about the dangers of alcohol at different age levels. Some receive instruction in elementary school while others may not receive classroom instruction until junior high or high school years. Still others are not receiving any health education. There is also a lack of uniformity in the curriculum which is being taught and the amount and extent of the information offered.

RECOMMENDATION 25: The Task Force recommends that a uniform health education curriculum for the kindergarten through twelfth grade (K-12) system be developed and implemented. It is recommended that such curriculum include education on the effects of alcohol and other drugs on driving.

PROBLEM 26: Although recently, more resources have been directed toward the development and dissemination of educational materials on drunk driving, it is apparent that additional emphasis is needed in certain specific areas clearly identified as needing attention. The Task Force has identified four (4) "problem targets" as follows:

1) Young drivers (16 to 24 years of age).

2) The workplace.

3) Common myths and incorrect assumptions.

4) Riders of two-wheeled vehicles and pedestrians.

RECOMMENDATION 26: Develop, promote and fund drunk and drugged driving programs, activities and campaigns, including but not limited to the following:

a) The development of countermeasure programs aimed specifically at young drivers (16 to 24 years of age).

b) The preparation and distribution of an informational packet for the workplace for use by businesses and governmental agencies. (Develop theme such as "How Drunk Driving Impacts Your Business.")

c) The development of public information programs and activities to help correct common myths and incorrect assumptions about alcohol and other drugs and driving.

d) The encouragement of alcohol countermeasure programs having to do with two-wheel vehicles, off-road vehicles and pedestrians.

PROBLEM 27: The abuse of alcohol and other drugs seems to be influencing the lives of young people long before they even consider driving a motor vehicle. Children are exposed to alcohol and other drugs at earlier ages than previous generations. While drug education may be starting sooner for these children, information on the effects of alcohol and other drugs on the ability to drive is not always part of the education.

RECOMMENDATION 27: Encourage schools to promote programs on the abuse of alcohol and other drugs as they relate to traffic safety.

PROBLEM 28: The Michigan Model for Comprehensive School Health Education is a joint effort by several state agencies. The curriculum is an attempt to standardize the content of information being delivered to Michigan school children. In reviewing the curriculum, however, the Task Force recognized a lack of information on drug abuse as it relates to traffic safety.

RECOMMENDATION 28: Encourage greater emphasis on drug abuse, as it relates to traffic safety, in Michigan Model for Comprehensive School Health Education.

PROBLEM 29: Driver education courses are experiencing increased difficulty in obtaining adequate financial support. The cost of such education is often too high for schools to bear, leaving prospective driver education students to seek proper education elsewhere. Additionally, driver education courses vary greatly in content, some devoting only a small amount of time to the problem of drunk driving, and others devoting a great deal of attention to the problem.

RECOMMENDATION 29: The Task Force recommends that adequate funding for a driver education curriculum be supported. It is recommended that such education be expanded to include training on alcohol and other drugs as related to traffic safety.

PROBLEM 30: Driver education courses are a useful medium for delivering important information on drunk driving. Adequate material is not always readily available to the classroom teacher.

RECOMMENDATION 30: The Task Force recommends that the Office of Substance Abuse Services, the Office of Highway Safety Planning, and the Department of Education collaborate to provide curriculum assistance and professional development to driver education teachers.

PROBLEM 31: There is no assurance of ongoing training for judges and other criminal justice personnel to obtain information relevant to substance abuse. Such information is vital in making appropriate sentencing decisions relevant to drinking and driving legislation as well as other drug related crimes.

RECOMMENDATION 31: The Task Force recommends that the training program developed by the Michigan Judicial Institute for Public Acts 309, 310, and 311 of 1982, or comparable training, and a shortened version of the program, be available for the judges and other criminal justice personnel. It is further recommended that the following items be included:

1) Positive aspect of intervention: "It Saves Lives."

2) Basic information on alcohol and other drugs;

3) How alcohol and other drugs effect behavior in general, driving in particular;

4) Language usage, i.e., denoting offenders as "social drinkers" fosters the attitude that drinking or other drug useage and driving is acceptable;

5) Descriptive overviews of potential referrals, i.e., education, treatment programs, alternative programs, self-help groups;

6) The assessment process, i.e., the procedure, testing tools and criteria used to develop recommendations for rehabilitation;

7) Comprehensive state prevention plan overview which stresses the necessity of a concerted effort of agents can effect supply and demand as it relates to alcohol and other drugs.

EVALUATION RECOMMENDATIONS

PROBLEM 32: Efforts to impact the "had been drinking" driver involvement in Michigan accidents have centered

around the traditional approaches of public information and education, and increased enforcement. While arrests and accidents are increasing, the involvement of the "had been drinking" driver in fatal accidents has also continued to increase as a percentage of the total. It is imperative that we try new techniques to deter people from irresponsible drinking and driving.

RECOMMENDATION 32: The Task Force recommends that in concert with the 1983 Report of the Presidential Commission Against Drunk Driving, the National Transportation Safety Board, and the National Commission on Drunk Driving, the use of temporary sobriety checklanes be used on a trial basis. It is recommended that these checklanes be operated within the definitions, goals, objectives and general policies developed by the Task Force.

PROBLEM 33: In order to improved the screening and assessment process, there needs to be continued open communication among the Office of Substance Abuse Services, District Court Judges and Probation Officers.

RECOMMENDATION 33: The Task Force recommends the Office of Substance Abuse Services, the Michigan District Judges Association, and the Michigan Association of Probation Services continue to meet on a quarterly basis to discuss and resolve any problems relative to the screening and assessment process. It is recommended that the District Judges Association communicate with its own membership on a regular basis regarding the screening and assessment process.

PROBLEM 34: Public Information and Education (PI&E) is the responsibility of many state employees, each assigned to a general area or topic. Unfortunately, there exists no single position in state government responsible solely for the

PI&E campaigns for drunk driving. The recommendations made by the Task Force will have little chance for success if left to a group of agencies.

RECOMMENDATION 34: The Task Force recommends that the State of Michigan employ a full-time staff to carry out these PI&E recommendations.

PROBLEM 35: There are presently no guidelines which determine the operation of Alcohol Highway Safety Education (AHSE) Programs. This has led to variability in methods of service delivery. Due to this lack of uniformity, it has been impossible to evaluate the effectiveness of these programs. For example, 75% of the licensed AHSE Programs are conducted by substance treatment providers. This has resulted in a therapeutically-oriented educational approach and a broad disparity among program objectives.

RECOMMENDATION 35: The Task Force recommends that the Office of Substance Abuse Services implement the standards for Alcohol Highway Safety Education Programs, which have been developed on a work group under the auspices of the subcommittee on Rehabilitation and Treatment (See Appendix J). These standards address structure, staff qualifications, curriculum and target populations. Implementation of such standards will assure uniformity and allow for valid evaluation. In recognition of the increasing involvement of other drugs in traffic crashes such as marijuana, especially among the young, it is recommended that the program title, "Alcohol Highway Safety Education," be changed to "Substance Abuse Traffic Safety Education."

[Testimony of H. Lawrence Ross, Transcript vol. I]

[8] H. LAURENCE ROSS, Ph.D., having been sworn in by the Clerk of the Court, testified on this oath as follows:

DIRECT EXAMINATION
BY MS. GORDON:

THE COURT: Welcome to the land of perpetual summer as we can see outside.

MS. GORDON: Deborah Gordon on behalf of the Plaintiff.

(BY Ms. Gordon, continuing)

Q. Doctor Ross, would you again state for us your [9] full name and current title, please?

A. H. Laurence Ross, I'm Professor of Sociology at the University of New Mexico.

Q. How long have you been at the University of New Mexico?

A. Three years.

Q. What is your specialty at the University of New Mexico?

A. Our specialty is sociology of law.

THE COURT: Sociology of the law?

THE WITNESS: This is right.

(Ms. Gordon, continuing)

Q. Prior to joining the University of New Mexico, where were you last employed?

A. I was at the State University of New York in Buffalo.

Q. What was your position?

A. Professor of Sociology and Law.

Q. Thank you. Can you briefly describe for us your educational background?

A. I have a bachelor's degree from Swarthmore College in Pennsylvania. A master's and Ph.D. from Harvard University.

Q. Give us your area of specialization in these degrees?

[10] A. An undergraduate degree in psychology, graduate degree in social relations.

Q. Okay. And have you submitted or published any reports or publications?

A. Yes, ma'am.

Q. And directing your attention, if you would, please to those that are involved with the issue of drinking and driving. Please, would you describe for us the nature of these publications?

A. I have done several studies of attempts to use law to deter drunk driving. Most specifically in the study of a British law of 1967, study of a crackdown by British police. Subsequent to that in 1975, study of a French law in 1978. Study of Scandinavian laws concerning drunk driving, and a book reviewing literature in the United States and throughout the world on deterring drunk driving which was published first in 1982.

Q. What is the name of the book you just referred to, please?

A. Called Deterring The Drinking Driver.

Q. First published in 1982?

A. That is right.

Q. Has there been a subsequent publication?

A. Yes, there's been a revision in 1984.

[11] Q. All right. Any other major writings or treatises in which you have directed your attention to the issue of drinking and driving?

A. Quite a few. I guess most recently I have studies in New Mexico law under contract with the State Department of Transportation. I have studied most recently a British crackdown in December of 1983.

Q. Excuse me for interrupting you, Doctor, with regard to the New Mexico studies, specifically what are you looking at there?

A. We have there administrative license suspension and I was in charge of doing an evaluation. We also have mandatory jail on the second offense for drunk driving. I was discharged with determining the extent to which the Courts and jails were in compliance.

Q. With regard to the study in Britain, what does that specifically concern?

A. That was a publicity campaign along with various police officers and the judiciary, the drunk cases which took place in and around Christmastime, 1983. I was charged with evaluating the effect of that on drunk driving.

Q. Go ahead, if you would, any other major publications in which you have directed your attention to the [12] issue of drinking and driving?

A. That — well, those are the major ones I recall.

Q. And with regard to the studies that have been done elsewhere, you have reviewed in preparation for your various publications concerning the issue of drinking and driving, highlight the important ones, please?

A. In the summer, summer of 1981 I believe it was, I spent three months at the United States Department of Transportation and Traffic Safety Administration. I read to the best of my ability the entire content of their library concerning efforts to use law to control drunk driving. Of course, many of these are my own studies. But there's a large amount of literature, studies from Canada and Australia. These are probably the major ones.

Q. Those being studies concerning what?

A. Concerning the attempt of Government to control drunk driving by the use of deterrent threats.

Q. Any major studies you are aware of concerning the effect of Government to control drunk driving that you have not reviewed or familiarized yourself with?

A. I've tried to keep up with the literature and I do not know of any major published major study of which I would be ignorant.

[13] Q. Are you familiar with the study that occurred in the United States concerning the efforts of law enforcement agencies and the like to have an effect on drunk driving?

A. Yes, I am.

Q. Could you briefly describe for us you membership in professional associations?

A. I am a member of the American Psychological Association, the Law and Society Association where I served two periods as trustee. The Society of the Study of Social Problems for which I served four years as elected secretary. I am a member of the International Committee on Alcohol, Drugs and Traffic Safety. Member of the Committee on Alcohol and Drugs and National Safety Council.

Q. Can you also describe for us, please, any fellowships or awards you have received? Again, directing your attention to those concerned with the issue of alcohol related accidents or drinking and driving?

A. My research of alcohol has been supported by the Insurance Institute of Highway Safety. It's been supported by the United States Government National Highway Traffic Safety Administration and the American Bar Foundation. I have just received a Fullbright lectureship to Finland to lecture [14] on the topic of sociology of law and specifically deterring drinking and driving.

Q. You indicated that you authored a book called Deterring the Drinking Driver. Would you briefly describe for us, please, what your research was concerned with during the compilation of that book?

A. That's basically a review of the literature, review of the world experience concerning the attempt of law to control behavior. I summarized in the Library at Washington and all of the published materials throughout the world wherever Governments were trying to use deterrent threats to control drunk driving, and where any kind of reasonable evaluation was attemped. Do you want more detail?

Q. Is there anything specifically in addition to what

you've already testified to that you reviewed and concentrated on other that what you have mentioned?

A. What I tried to do was the organization of all these experiences into theoretical relative categories. Attempt to increase severity of punishment, attempt to try to increase the severity of the likelihood of punishment, attempt to increase the swiftness of punishment.

Q. Doctor, are you familiar with the term, alcohol related accidents?

[15] A. I am.

Q. Alcohol related fatalities?

A. Mm-hmm.

Q. And is that terminology commonly used in the data and studies you have reviewed?

A. Correct.

Q. Is that a term that's nationally used within the United States?

A. Mm-hmm.

Q. Is that a yes for the record?

A. That's a yes for the record.

Q. All right, thank you.

What does the term alcohol related accidents or fatalities refer to?

A. It usually refers to an accident where it's been determined, often by the police and sometimes by a laboratory,

that some party involved in the accident had a blood alcohol concentration over a given amount. In New Mexico, we use .05 percent blood alcohol concentration. That any party in the accident, either the driver or pedestrian has that amount of blood alcohol. That's considered to be an alcohol related accident.

Q. If an accident is alcohol related, does it necessarily mean that it was caused by alcohol?

[16] A. Although some people have jumped to that conclusion that's not the case.

Q. Why not?

A. One alcohol related accident where you can see the difference clearly is if you were drunk and I was sober. I crossed the road and hit you head-on, that would be an alcohol related accident, even though the fault would clearly be my side, or if I were a drunk pedestrian and dashed out into the highway. You soberly came along and ran into me and killed me, that would be alcohol related fatality even though the alcohol would not have caused that.

Q. With regard to the way statistics are kept in the United States, from your observation and review of them, is the data vis-a-vis drunk driving normally picked up in the terms of alcohol related as to compared with caused by alcohol?

A. You very seldom see cause by alcohol, although this is fairly alcoholic.

Q. Have you been able to determine within a reasonable degree of scientific certainty what the number of accidents in this country are that are actually caused by alcohol?

A. I haven't personally done the research, but the [17] National Academy of Sciences has published a paper with an

estimate of approximately twenty-five percent of all fatal crash related fatalities, meaning actually caused by alcohol since the number, the total number of fatalities runs between forty and fifty thousand, one would say between ten and thirteen thousand people annually are killed in accidents caused by alcohol.

Q. So if the statistics are utilized which would indicate fifty percent of all accidents are alcohol related, that does not mean fifty percent are caused by alcohol?

A. That is correct.

Q. All right. Have you been able to determine, within a reasonable degree of scientific certainty that the nature of the victim in drunk driving accidents?

A. Not my own research, but that of the National Highway Traffic Safety Administration. James Fels (phonetic), who has published an analysis of the United States fatalities from what is called FAIR System of Fatal Accident Reporting System. Mr. Fels says that more than half of the fatalities in alcohol related crashes are themselves drunk drivers. So that the typical [18] victim of a drunk driving accident is a drunk driver. An additional twenty percent of drunk passengers of drunk drivers, say drinking with the driver who get killed in the accident. And another ten percent are pedestrian.

Q. In your opinion, are those methods of, vis-a-vis law enforcement techniques and the like of effecting a rate of fatalities be caused by alcohol?

A. Yes, I think they are.

Q. And what are the methods of effecting a rate of fatalities caused by alcohol in your opinion?

A. My research of the cases indicates that these deterrent threats of punishment can be effective in the short run

to the extent that they may convince people their chances of being punished are relatively high. That is punishment is likely and in certain consequences of misbehavior. It is also reasonable as contrasted to the case if punishment is applied quickly and swiftly, that it is going to be more effective than if it is applied after a long delay.

Q. Using all methods available that you are aware of, in your opinion what are the best methods for protecting a driver from a possible fatal alcohol caused accident?

[19] A. Well, you have to answer that on several levels. One goes back to the question I answered previously which shows that frequently the victims of drunk driving are themselves drunk. And maybe it's a physical answer, if you don't drink and drive situation your chances of being a victim are reduced by eighty percent. More generally in terms of the kind of effect of public policy might reduce the toll of alcohol related as well as other crashes, passenger restraints are accepted by the safety community as probably the most promising cost effective approach.

Q. What else is a promising method vis-a-vis cost effectiveness in protecting citizens from the likelihood of a fatality?

A. Beyond passive restraints, such as an air bag, we have active restrains such as an existing seat belt. And laws that mandate compliance with the administering of seat belts. A chief compliance through the enforcement system to have some positive outcome varies by the jurisdiction. There is also considerable evidence that the approach tries to get people either to drink less or to drive less may be cost effective and safe. Thus taxes that raise the price of [20] alcohol have been shown to be related to a lesser amount of drunk driving. And we speculate, although we don't know very well that such things as improved public transportation would be a means of getting and obtaining less drunk driving. For example, the drunk driving happened, is not very important because when people drink, they take the subway and they live in Manhattan. If you could make the United States into Manhattan, you wouldn't have drunk driving.

THE COURT: Would you want to?

THE WITNESS: You don't have to ask that from somebody from New Mexico. I mean in general the problem of drunk driving is built into this society. We are a society who approves of the use of alcohol, and a society dependent upon the private automobile. And given these facts, drunk driving is structured, is going to be a part of the way of life that we value.

(By Ms. Gordon, continuing)

Q. Are you saying it is your opinion that using passive and unpassive restraints is the most effective way of protecting the driver?

A. If you could put an air bag in every car we would [21] expect it would reduce total fatality rate in crashing about fifty percent. Whereas if you get rid of every single drunk driver on the road, we expect to reduce the fatality rate by twenty-five percent. Which is the more feasible and which is the more fruitful approach, I think is very obvious.

Q. Have you reviewed any studies or any data which would indicate where the drunk driver is coming from physically from where when he's on the road?

A. Mm-hmm, I have.

Q. What does the data reveal in that regard?

A. Generally speaking, one of the most important sources of drunk driver factors, if you will, are bars and tav-

erns. I mean studies show the single leading source of origin of drunk drivers.

Q. Are you able to give us, within a reasonable degree of scientific certainty percentages of drivers on the road who are drunk and who are coming from a bar or tavern?

A. One might say, based on review of these studies, where people are stopped and asked where they are coming from and given tests, one might estimate forty to fifty percent of the drivers do come from taverns.

[22] Q. Based on that data, have you formulated an opinion with regard to any law enforcement techniques vis-a-vis bars and/or taverns which could be of assistance?

A. I think one could come to the conclusion that additional civil liability, enforcement of license laws that prohibit service of intoxicated persons, training of service personnel so as to be able better to identify customers who are drunk. The offer of free rides home from bars, are all promising kinds of counter-measures. Based on that position we haven't much experience with it.

Q. Are you familiar with any law enforcement techniques wherein efforts are directed towards — by law enforcement of the bars and the taverns as the wrongdoers?

A. There has been a proverbial story, never been able to trace the original source. The State of New Jersey tried to enforce its licensing regulation with teams consisting of one policeman, one member of the Alcohol Beverage Commission, and the two volunteers. They would go to the roadhouses with the reputation of being particularly problematical. They would sit down, and if they saw somebody leaving after having been served and who they [23] considered intoxicated condition, the policeman would stop the person driving, would take them home and see — would close the place

down for thirty days and fine them three thousand dollars. That was repeated and as I said to have been quite effective in changing the serving practices in the areas concerned.

Q. Do you know of any method, perhaps not proverbial, things you are aware of any methods that could be directed towards bars and tavern owners in your opinion would be effective?

A. I think I have mentioned them, generally speaking enforcement of the licensing laws, and perhaps as well as liberal dram shop legislation a common law proceedings may well be effective.

Q. And is it possible to determine today where high alcohol, high incidents of alcohol related fatalities occur?

A. Yes.

Q. How is that done?

A. You have a FAIR System, covers the United States. The FAIR System, it has some problems and defects, it's fairly accurate. It will give locations of all fatalities and where these fatalities have been tested, will tell us which ones are alcohol [24] related. These can be blocked.

Q. It is possible for law enforcement personnel in the United States today to become aware of the high rate of alcohol accident areas?

A. More so in states that do a more complete job of testing their fatalities.

Q. Have you reviewed any data or studies which would indicate to you whether there is effectiveness in effectuating arrests of drunk drivers by selective patrols of these areas?

A. Yes, I have.

Q. What have you learned in that regard?

A. The study I'm thinking of corresponds to the increasing the amount of patrols. We also start with the fact in no jurisdiction that I know of, are drunk drivers being held, I know no jurisdiction do we — like this, try to apprehend. We are starting from a given level of study, I'm referring to the deals with campaigns to increase the amount of enforcement in given areas. I have reviewed quite a few of these in the United States, and the broad findings have consistently shown that for the duration of these campaigns which tend to be very short run, a month or two, there is decline in fatal crashes, which suggests that [25] a deterrent effect has been achieved on people in that area. They're not doing as much drunk driving as they did before.

Q. Would you refer to that technique as selective road patrol, or are their different terms that are appropriate?

A. I call them police crackdowns.

Q. Thank you. In your opinion, Doctor, what is the single most effective method of putting apprehension into the mind or heart of drunk drivers, which might have a positive effect?

A. I don't know if there's a single best method. That's clearly if the media are invovled in any effective method. All of these crackdowns have achieved media attention. I think a media attention could be shown to be crucial if a crackdown were to be attempted without any publicity, it would very likely not be sufficiently perceived in the community. Therefore, it would not have any effect.

Q. What I'm directing my attention to now is specifically law enforcement methods or techniques which in your opinion, seem to be effective with regard to the manner in which the motorist is actually handled vis-a-vis a stop and the like?

[26] A. I'm afraid I don't follow the question.

Q. Okay. You indicated earlier that you were doing a study in New Mexico which regard to license revocation. What does that refer to?

A. Administration of license suspension is based on Statute which permits the police to lift the license of a driver on the spot. That is the moment that person either fails a breath test or refuses a breath test in New Mexico, we have different penalties. An automatic ninety day suspension for failing the test. A year's suspension for refusing the test. Our law has typically provided that a brief permit is given to the offender at the time the license is taken which will expire either in ten days, or following administrative hearing. If the Defendant does not demand a hearing, licenses in this case, such as administrative hearing, suspension goes into effect. This looks as though it might very well be doing us some good.

Q. Are you aware of any data that exists, data or studies that you have seen which would show license revocation a cost-effective technique?

A. This kind of revocation, this revocation looks very, very promising in the evaluations that have [27] done. If I take your question it would be license revocation seem to be —

MR. O'BRIEN: — Objection, Your Honor, I would ask that the witness be directed to answer the question that was asked.

THE COURT: He's — he can ask her if he's not sure what it was. We will — if you want to ask, you may do that.

THE WITNESS: Is your question is license suspension as effective a penalty as fines or jails? Is that the question?

MS. GORDON: Yes.

THE WITNESS: It seems to be most effective penalty from the point of deterring drivers in general, and from changing behavior of these people who are sentenced.

(By Ms. Gordon, continuing)

Q. Were you able to form an opinion and conclusion on that point?

A. It seems to be the most feared technique in the legal art. No one has ever proposed capital punishment for drunk driving. Within the limit of what we are doing, that seems to be the most concern of these people who are arrested.

Q. More fear than spending some time in jail perhaps?

[28] A. This is based on the report we have from defense attorneys, from prosecutors, from judges, yes.

Q. And what is your opinion with regard to the effectiveness of the campaign, of stepped-up prosecution and enforcement of drunk driving laws as an effective technique.

A. We — our own experience shows in the form of campaign with a limited duration is very likely that there will be less drunk driving, provided it is adequately publicized.

THE COURT: What?

THE WITNESS: Adequately publicized, Your Honor.

(By Ms. Gordon, continuing)

Q. Can you describe for us please what the concept of deterrents is?

A. The idea of deterrents is that a legal threat or for that matter any kind of threat is going to be more effective to the extent that the penalties are severe, that they're certain, they are swift.

Q. And of these three, have you formed an opinion with regard to what effective —

A. — Yes, I have.

Q. What is that?

A. It looks as though existing research strongly [29] supports the effectiveness of penalties that are perceived and relatively certain are more likely.

Q. In your opinion, can deterrent techniques that are utilized by the law enforcement agencies have short run effect, positive effects on drunk driving fatalities?

A. I think they can.

Q. I don't know where to put this thing so you can hear. Is this okay?

What is necessary to effectuate a short run or a short term positive impact in statistics?

A. It is the — perhaps among the relevant public that they have a reasonably high chance of being caught and punished.

Q. Now, you say there's a short term effect. Why do you say short term?

A. In every study that has shown this effect, it has also shown the effect has either disappeared or has tended back toward the previous condition immediately after the fact.

Q. I'm sorry?

A. Immediately after the effect is experienced, which we see in terms of drop in night fatalities, things start going back the way they were before.

[30] Q. And that has to do with the public perception, is that your testimony, what you are saying?

A. My explanation for that is the public is misled by the publicity into thinking that the chances of punishment are greater then they actually are. And that what they are seeing is a learning curve, whereby the public is learning that the chances of punishment are indeed not as high as they were led to expect.

Q. So in your opinion is media publicity of a deterrent campaign a key to any possible short term effect they have?

A. Yes, it certainly is.

Q. And are there any studies you know of which would indicate that a deterrent campaign or a sort of law enforcement would have more than a short term immediate impact on the fatality statistics?

A. No, the longest provable deterrent influence in drunk driving in literature is two years, which took place in Great Britain in 1967, '68.

Q. The other studies indicated from that time whatever deterrent effect has been made begins to recede?

A. All studies seem to indicate the deterrent effect once achieved decays and the life of them tends to be no more than two years in the British case, and [31] usually shorter than that.

Q. Is it your testimony that any deterrent, positive deterrent effect that occurs is due to media?

A. That it is — media are required, it's interaction, I think if the media are lying, it's very likely the effect achieved will last much shorter time. If the media are telling the truth, the public tends to run with it and to exaggerate the amount of risk they are running. We have some studies which show that media attention alone without enforcement can seem to have some kind of deterrent effect. Perhaps reminding them they are, these policemen are out there and they are indeed looking for you. You do run a risk of losing your license and paying fines or whatever if you drink and drive.

Q. Are you familiar with the use of a deterrent effect known as roadblocks, sobriety roadblocks?

A. I'm familiar with attempts to achieve deterrents through roadblocks, yes.

Q. And are you — have you formed an opinion with regard to the use of the roadblock technique, as to what percentage of drivers who go through a roadblock are actually arrested for drunk driving?

A. Yes, these data are available.

Q. What does that data indicate?

[32] A. The data indicates on the order of one percent or even less of drivers who pass through roadblocks scheduled at nighttime are in fact arrested for drunk driving.

Q. Is there any data that you are aware of which would indicate that a drunk driving roadblock effectuates a high rate of arrests of drunk drivers?

A. No, there are no reports to the best of my knowledge anywhere in the world of a high yield of arrests.

Q. And what is your opinion then with regard to the use of drunk driving roadblocks for the purpose of effectuating a high rate of arrests of drunk drivers?

A. It's worthless.

THE COURT: Doctor, it's worthless in terms of the deterrent effect or worthless in terms of arresting drunk drivers?

THE WITNESS: Your Honor, I was asked in terms of arresting drunk drivers.

MS. GORDON: I'm about to get to that, my next question.

(By Ms. Gordon, continuing)

Q. Doctor Ross, are any studies available, or are you aware of any studies out there which would indicate that the use of the drunk driving roadblocks as of today's date are an effective technique for long term deterrence of alcohol related fatalities?

A. As of today's date there are no credible studies that support that assertion.

Q. Are you aware of a study that was done in the State of Maryland?

A. Yes, I was able to obtain a copy of the 1983 document which was the initial or preliminary evaluation of roadblocks in certain counties in Maryland.

Q. What was that report evaluating?

A. It was evaluating a three month crackdown and as I recall two counties, by the State Police.

Q. Was there anything in that report that you became aware of which would indicate to you that there was any type of substantive long term deterrent effect?

A. There was not.

Q. And does that data reveal to you any data with regard to the effect of roadblocks on total fatalities within the targeted counties?

A. There were measures of — numbers of fatalities in the targeted counties and comparison counties. Yes.

[34] Q. What did research data indicate on that?

A. The data showed there were — was increases in numbers of fatalities in the targeted counties.

Q. The fatalities went on to count where the roadblocks actually occurred, according to the Maryland studies, you reviewed —

A. — That is correct, the numbers were so small as I recall, three and eight. The numbers, we could not make anything of that fact. We wouldn't say roadblocks caused death or they caused drunk driving, we simply think that the fatality data do not give us any reason to support the deterrent effect.

Q. Are you familiar with the study that came out within the last seven years or so from the American Bar Association with regard to the use of roadblocks as a drunk driving technique?

A. Yes, there was a report by the Criminal Justice Action, American Bar Association which looked into the general

question of enforcement, and which paid particular attention to the roadblock technique.

Q. And what was the conclusion of that report as you studied it?

A. The conclusion that there was — there was no empirical evidence supporting deterrent effectiveness [35] of these techniques.

Q. I think I am just about finished if I could just have a moment, please.

Doctor, you refer to some deterrent techniques previously which you felt that were in your opinion, had a short term positive impact, I think you said due to media attention and the like; is that correct?

A. Yes.

Q. Is it possible in your opinion that the use of roadblocks would fall into that category as well?

A. It is possible.

Q. In other words, that given additional media attention and the like could have a possible short term effect.

A. The roadblocks, after all, are new. Media like things new. They're what you would call news, they are quite likely to pay attention, and that attention is quite likely to remind them of the general deterrent approach effective in our laws.

Q. The time factor that you have described in some of the other new type of deterrent techniques that have been attempted?

A. Right, I would expect the effect would wear out as all of the others have.

Q. Thank you very much, Doctor. I have no further [36] questions at this time.

THE COURT: Do you think that would be true if there were repeated media efforts of publicizing the roadblocks?

A. I think in the end any technique stops being used, it stops being noticed.

CROSS EXAMINATION

BY MR. O'BRIEN:

Q. Thank you, Your Honor. Patrick O'Brien, Assistant Attorney General.

Mr Ross, my understanding that the percentages that you gave such as twenty-five percent of fatal deaths in traffic accidents involving alcohol and the other percentage that you gave, these are based on other literature, not your own personal studies?

A. Of course I have studied this literature and I am responsible for knowing its content. The figures I mentioned from the National Academy of Sciences.

Q. I see. Now in your testimony, you seem to make a large point of saying, the largest percentage of people being killed are drunk. Does this mean to indicate that you think for some reason they are entitled to protection of the law just as anybody else?

[37]A. Indeed I think one of the paradoxes of the statistic is they indicate nothing that is going to save the life of vic-

tims of drunk drivers — we'll have to save the lives of drunk drivers themselves.

Q. The fact that somebody perhaps has been drinking and a passenger, they also are not entitled to any less protection?

A. Quite right, sir.

Q. The fact somebody has perhaps been drinking and is walking, that does not entitle him or her to less protection under the law?

A. The questions you're asking are my personal opinion, but now from not my professional opinion, I would agree, yes.

Q. You further make the point that if you don't drink yourself, the percentage, this chance of being killed by a drunk driver involved accident is considerably less?

A. If I don't drink in traffic situations, if you drink at home, that's irrelevant.

Q. Do you ever advocate prohibition in regard to the driving?

A. I think the evidence is clear, prohibition is man's way, is not successful as a policy. I have never advocated it.

[38] Q. You seem to indicate that drinking in our society is quite built into the society?

A. That is correct.

Q. So we — is it your position that you must take society as it is and not talk about utopia?

A. I think that's fair, although society as it is, could be

changed I believe in the effectiveness of social policy. I believe in that because I have studied it and seen it.

Q. You indicate where there's a crackdown in bars and taverns this served to effectuate the number of people drinking and driving; is that correct?

A. That's yes, not much study has been made. It makes some sense. We don't have the kind of evidence to justify. It is sensible.

Q. That conclusion is not based on any studies, but based on your own opinion?

A. It's based on anecdotal evidence.

Q. You indicate where selected patrols, a police crackdown, that you can reduce drunk driving; is that correct?

A. There is effectiveness of the crackdowns on drunk driving within the limited time frame in which they are conceived.

Q. Where there is not medial involved with the police [39] crackdown, is that as effective?

A. No, there is not much evidence, but I will give you one example I studied personally. In 1975 the chief constable of a British county decided to demand that these officers enforce or utilize the opportunity to test any driver who's in an accident whether or not it's his fault. Anyone in the moving violation. They did it for a week. And had a very interesting yield. They got a lot more tests, found a lot more drunk drivers, but the media did not know about it. There was no effect on the drunk driving as far as we could tell judging by nighttime fatalities. Later in the summer they repeated this intervention. This time it leaked out and the press discovered it. And there were comments on the drinking and the civil liberties of the people in question. It made a lot of press

within that county. And this time there was a demonstrable impact during the month of the campaign. We could see a decline in the fatalities in that county.

Q. Where there is a police crackdown, any evidence that there is a long term effect?

A. Police crackdowns to the very best of my knowledge, always are limited. This is for Christmas or this is the fourth of July, and this is safety month. I [40] haven't known, and I haven't read of permanent publicized crackdowns of this type. Rather these are limited in duration and relatively short. A month is the longest I come up with.

Q. What is the most effective long term procedure that can be used to reduce drunk driving based on your studies or the studies that you have read?

A. The most effective long term — there really is not incremental procedure more than we are doing it. It has been shown to act over the long term from a deterrent point of view. I am thinking, there is one study that has reported a police crackdown of longer than a month. That's at Stockton, California. As long as the intervention went on, I think it was a year, they were able to show some impact that the police were taking away things. And then it went back to how it was before. I will correct my previous testimony. I just don't think we know at this point anything that we can do in the way of law enforcement that we can rely on as having a permanent effect on drunken driving other than what we are doing already.

Q. Have you ever studied in these countries where drunk driving is a capital offense as to what effect [41] it had in these countries?

A. I don't know if there are any countries where drunk driving is a capital offense.

Q. Could you identify the countries where drunk driving is a capital offense?

THE COURT: Perhaps we out to define capital offense. It may have a different meaning for different people.

THE WITNESS: You want to define that?

(By Mr. O'Brien, continuing)

Q. Are you aware of any countries where drinking and driving could be punishable by execution?

A. I am not. The Library of Congress is rather void in the international literature on drunk driving laws. And as I recall I came up with no place in the world where drunk driving is a capital offense. There was a letter once in Durabi (phonetic), as I recall, which made all sorts of assertions about what happens in Rosstania. Marked in death, left for the cross. That is completely — not backed up from one source to the next. No truth in it.

Q. You indicated the media plays a large part in any type of long term effects on any operations; is that right?

A. Any short term effect.

[42] Q. Would it be true, is there a correlation between the fact of media attention and longer effect of a specific program?

Q. I think this is reasonable.

Q. You indicate if the media is lying, then it would have more short term effect?

A. If your personal experience says that, well, I haven't seen any of these police patrols or roadblocks on my block and my friends don't report any. It's reasonable to think that

Lincoln was right, you can't fool everybody all of the time.

Q. You're not then accusing the media of ever lying?

A. I wouldn't think so.

Q. Going then to sobriety checkpoints, I think they're also called sobriety check lanes. Is that true in the literature they carry several different names?

A. Yes.

Q. Would it be true, sobriety check lanes or checkpoints for the short time have shown to have some positive effect as far as deterrent?

A. That is correct.

Q. Isn't it true your own studies have shown that?

A. Particularly the French law which had mandatory breath tests for everybody going through, regardless of the cause of suspect.

[43] Q. Isn't it true that the Maryland study as far as drunk driving accidents showed a deterrent effect?

A. I would say that they showed there were fewer accidents the following year that the police judged were attributed to alcohol. However, the police judgement is not accepted as valid measure of the amount of drunk driving. And the method of comparing one year with the other is not considered an appropriate type of measurement.

THE COURT: By whom?

THE WITNESS: Social Sciences as evaluation researchers, Your Honor. The reason being that there is — there is so many other things that happened between these two years,

none of which have been controlled, for there aren't long term trends to date which have controlled. In other words, for instance, we are experiencing year after year a decline in the fatality rate on the highway, going on since 1920. So that in general any one year is going to look better in fatalities than the previous one. If you claim like what I did, you may just be claiming for yourself a long range trend. We have random variations from year to year. There was not effort in that study to try to show that the change was greater than you would expect [44] from general variation.

Q. I see. You do say there is evidence of a deterrent effect on the short term than as to lives saved?

A. Yes.

Q. Would you agree any life saved is worth the saving?

MS. GORDON: Objection, Your Honor, to this witness responding.

THE COURT: He's asking for personal opinion, and I suspect most of us know what the answer is. Go ahead, Doctor, for the record.

THE WITNESS: Saving any life is worth saving. I don't think of any exception at the moment.

(By Mr. O'Brien, continuing)

Q. Thank you. I would like to have this marked, please.

(Whereupon the Reporter marked Defendants' Exhibit Number 1.)

(By Mr. O'Brien, continuing)

Q. This has been marked as Defendants' Proposed Exhibit 1, and I ask if you recognize that document?

A. I certainly do, I wrote it.

Q. What is that document?

A. This is a piece of paper that was written for the Journal of Studies on Alcohol a Research Foundation Conference in Baltimore. It has been printed along with other papers given at the conference. The [45] Journal on Studies on Alcohol.

Q. What is the date of that particular Journal?

A. This is July, 1985.

Q. That's a recent paper and a recent Journal, is it not?

A. The material was written towards the end of 1983 in the delay being — when they were — this would be current at the end of 1983.

Q. The information is this particular Journal, the article, do you still hold to these statements?

A. I assume so, I haven't had a chance to read it over recently.

Q. With the permission of the Court, I would ask that you read from the section —

A. — Mm-hmm.

Q. — beginning where it says sobriety checkpoints.

A. Mm-hmm.

Q. And ending where that particular provision stops.

A. Mm-hmm.

Q. A long section to read —

THE COURT: You want him to read it out loud?

MR. O'BRIEN: I would like him to read it out loud.

MS. GORDON: I would object at this [46] point until there's a request with regard to the nature of the document itself, with regard to him to simply reading it into evidence.

MR. O'BRIEN: Your Honor, this —

THE COURT: Read it to yourself, Doctor. You may question him on it.

MR. O'BRIEN: Fine, Your Honor.

(By Mr. O'Brien, continuing)

Q. Again, Doctor, is it still your position?

A. It is still my position.

Q. Is it your position that sobriety checkpoints are an enforcement technique with high visibility with theoretical potential to increase the perceived certainty of punishment among drunken driving law violators?

A. Mm-hmm, yes.

Q. Is it your understanding that they are currently being applied in as many as twenty-one states?

A. It is.

Q. Since the material is written, have there been found additional states that have adopted this procedure?

A. I know personally of at least one, I assume perhaps more also. In some states, Courts have held they are unconstitutional. In some that they're [47] Constitutional. I would guess about the same or more in total.

Q. In your report you indicate that the intensive use of checkpoints was made recently in the state of Delaware, Maryland. Delaware used the checkpoint state-wide between December 1983 and August 1983 reporting ten percent decrease in injury accidents and thirty-two percent decrease in alcohol related injury accidents during the checkpoint, as compared with a previous patrol period.

Montgomery County, Maryland reported seventy-five percent decline in deaths from alcohol related accidents during the checkpoint period from July 1982 through July 1983, compared with a prior baseline. Is this based on your own research of these particular actions?

A. Based on my reading of their reports and in context I say the report cannot be determined by — they are scientifically deficient.

Q. Based on these reports that was your understanding?

A. That's their claim and the claim, of course, they achieved these results.

Q. Please just answer my questions.

Do you as part of a deterrent recognize this particular article, the fact that people estimate [48] a higher likelihood of arrest for drunken driving in the checkpoint areas than in comparison areas?

A. You're talking about different studies. In Montgomery County and Fairfax County. Their estimate was higher likelihood of arrest, no reported change in drunk driving behavior.

Q. I see. However, there is public perception, is there not, at least what that particular study indicated, that there is a higher likelihood of being caught?

A. Yes, there they reported —

Q. — It translated into deterrent effect?

A. Apparently there's no evidence it did translate in that case, but there was evidence it did not translate.

Q. You indicate in other studies there was deterrent effect where check lanes had been used?

A. Not in Montgomery County or Maryland.

Q. Please listen to my question. In other studies there has been indication that there is a deterrent effect?

A. Short range deterrent, yes.

Q. Is it your testimony that the evidence on checkpoints in encouraging but not persuasive in light of translating into deterrent theories, or a checkpoint [49] may be considered a high priority matter for policy analysis?

A. Provided checkpoints are ethical and Constitutional.

Q. I understand that. We assume at this point, is that still your position?

A. That is still my position.

Q. Thank you.

THE COURT: I understand your position. Still requires a great deal of study to come up with a definitive opinion?

THE WITNESS: Yes, sir Your Honor. The evidence at the moment is incapable of supporting any claims that the deterrent over the long run has been achieved by checkpoints. Or for that matter, our law enforcement techniques.

(By Mr. O'Brien, continuing)

Q. I see. I understand that you are currently on the Committee on Alcohol and Drug Abuse; is that true?

A. Alcohol and Other Drugs of the National Safety Council.

Q. That's the Highway Traffic Safety Division of the National Safety Council; is that true?

A. I can't remember the exact bureaucratic location.

Q. Approximately how many people are on this particular committee?

[50] A. Thirty or forty.

Q. In the last meeting, October of 1985 in New Orleans, is it true this particular committee took and made a policy statement in regards to check point check lanes?

A. There was a hurricane in New Orleans at the time, and my plane stopped in Dallas and I never got there. I had read the minutes. I just don't recall now what the outcome was.

Q. I would like to have this marked.

(Whereupon the Reporter marked Defendant's Exhibit Number 2.)

(By Mr. O'Brien, continuing)

Q. I'll give you what has been marked as Defendants' Proposed Exhibit 2 and I would ask that you read that.

MS. GORDON: I believe if we could have it identified, could we have identification of the document, please, Your Honor.

MR. O'BRIEN: This is the position, statement of the High-

way Traffic Safety Division taken in New Orleans in October of 1985.

THE COURT: Normally that would come from the witness chair, I will permit you to testify this morning.

[51] MR. O'BRIEN: Thank you, Your Honor.

(By Mr. O'Brien, continuing)

Q. Mr. Ross, is that as I have purported it to be in fact a policy statement made by the Highway Traffic Safety Division of the National Safety Council?

A. It appears in the minutes of the meeting, and I think that's fair.

Q. This is — you are a member of this committee which is part of the division of the National Safety Council?

A. That is correct.

Q. You agree with the policy statement, that of the National Safety Council that they would urge all drivers nighttime moving in relation of crashes — strike that.

Use passive alcohol sensors to screen all drivers involved in nighttime moving violations and crashes, road safety checks, is that your understanding of part of this policy?

A. I understand that's an example of the general point they're trying to make which is that we need to show with necessary worthy kinds of police activities in order to attract the attention of the public. To legally threaten, one example of several that they give, passive alcohol checks, like a sample of the breath, you go up to a driver and you say this is a [52] safety check, you know what that means. He says yes and you give it to them.

Q. Wouldn't you agree, are you familiar with the Michigan sobriety checkpoints?

A. I read the guidelines for it, as much as I know.

Q. Wouldn't you agree the fact that we don't use passive alcohol sensors, would it be less intrusive —

MS. GORDON: Objection, Your Honor, calling for legal conclusion. I'm not sure what Counsel is referring to intrusive. It does have a legal connotation.

THE COURT: She's right, Mr. O'Brien. I'm sure you can word it differently and get the answer.

(By Mr. O'Brien, continuing)

Q. Wouldn't you agree that the Michigan sobriety checkpoints would fall within, fall within the recommendations of this policy statement of your Committee on Alcohol and Drug Abuse?

A. I think so.

Q. I have no further questions of this witness.

THE COURT: Any redirect?

MS. GORDON: Just a few, Your Honor.

REDIRECT EXAMINATION

[53] BY MS. GORDON:

Q. Is it correct, Doctor Ross, that any new deterrent technique that occurred with attendant media publicity as an exposure and the like would have a potential for deterrent?

A. Yes.

Q. Okay. And getting back to your discussion about the purpose of media publicity and so, you mentioned a learning curve. Could you describe what you meant in that regard?

A. When these police crackdowns are introduced, we see a decline in nighttime fatalities which indicates people are doing less drunk driving. Immediately following the point of intervention, let's say a new law comes into effect putting the police out there on the highway January 1st. Immediately following that, things seem to go back to the way they were before. I interpret that as the result of public learning. That's the note that was publicized, was not as severe as expected.

Q. What is your opinion with regard to the deterrent effect of a program which effectuates a very small number of arrests. Once the public perceives that to be the facts?

A. The effectiveness would die out and the deterrent [54] effect would die out.

Q. It is your point once the public is understanding they have a low apprehension of being arrested, the initial good, the positive impact wears off?

A. It seems to again and again throughout the world, yes.

Q. Okay. You would say that a roadblock deterrent has the same position known for a short time immediate impact in fact as other new techniques?

THE COURT: Ms. Gordon, we seem to be going over the same ground again and again.

MS. GORDON: I'll move along, Your Honor.

(By Ms. Gordon, continuing)

Q. What would your opinion be of the deterrent nature of a roadblock program wherein throughout the State of Michigan on any given weekend night there would be one roadblock in the State and the public would be aware of the fact there was one roadblock and be advised in advance what the County the roadblock would occur in?

A. Common sense would suggest it wouldn't be very threatening to those people living outside the County. And it might actually be counted productive as a deterrent by assuring that the [55] residents elsewhere in the State, significant police resources were being directed to the market some place where you are not.

Q. Thank you, Doctor.

RECROSS EXAMINATION

BY MR. O'BRIEN:

Q. You would agree, Mr. Ross, in regard to that one particular County where the roadblock was in fact, it was well covered by the media and that would have the certain potential for deterrence?

A. That's an overstatement, it is made in deterrent threats.

MR. O'BRIEN: Thank you.

MS. GORDON: Nothing further, Your Honor.

THE COURT: Thank you for being here today, Doctor. Wish you luck in going back to some place like New Mexico, Have a good trip. I think we will take a short recess.

(Whereupon the Court adjourned at or about 10:50 A.M.)

[Testimony of Gerald L. Hough. Transcript vol. I]

[72] Q. It is correct there were thirty-five recommendations made in the Drunk Driving Task Force Report?

A. Yes.

Q. And these thirty-five recommendations — excuse me — directed themselves to what?

A. Anywhere from educational programs to administrative licensing to sobriety checkpoints.

Q. They were all methods of getting drunk drivers off the road, is that the purpose of the recommendation?

A. Well, it was all the main purpose was to reduce drunk driving. To either confine them, to deter, to educate.

Q. The task force came up with thirty-five different ways this might be accomplished?

A. Yes.

Q. You would agree, wouldn't you, that the checkpoints were not weighted — were not weighted actually more heavily than any of the other thirty-four?

A. There was more discussion on the checkpoints than any other that I recall.

Q. But with regard to the conclusions reached by the task force itself, you did not weight the recommendations [73] in order of —

A. — The thirty-five recommendations are not in priority listing.

Q. And that the — excuse me — that the Drunk Driving

Task Force did not weight its recommendations any more heavily than any of the others?

A. No.

Q. All right. Do you have any idea, Colonel, what became of the other thirty-four recommendations made by the Drunk Driving Task Force?

A. I'm not aware of any of them being implemented.

Q. Would it be correct, you felt that these thirty-four other recommendations were also good, good things to try?

A. Some of them are, yes.

Q. You're not aware of any of them being implemented?

A. No.

Q. To your knowledge, the State Police are not doing anything with regard to the other thirty-four at this time?

A. No.

* * *

[82] Q. Observation — with regard to the way your plan is [83] implemented, Plaintiff's Exhibit 1, how many officers did your plan call for normally being on the scene?

A. I believe we call for a minimum of about eight and up to twelve.

Q. Does that include sheriff's deputies that you will be utilizing?

A. Yes.

Q. Combination of Sheriff's Department, Department of Michigan State Police personnel?

A. Yes.

Q. It is correct, is it not, you always have a commanding officer?

A. Yes.

Q. What rank commanding officer do you require being on the scene for one of these checkpoints?

A. Lieutenant or above.

Q. Whatever rank, he should be a rank of lieutenant or above must be present?

A. Yes.

Q. It is true, is it not, Colonel that your purpose in effectuating or attempting to effectuate this Checkpoint Plan is not to obtain large numbers of arrest of drunk drivers?

A. That is correct.

Q. Is it correct, is it, as far as you are aware, other [84] states that have tried this have not found they are getting a high rate of arrests?

A. Yes, that's my understanding.

Q. What was your purpose then, Colonel, in attempting to implement this plan if you don't intend to use it to get drunk drivers arrested?

A. Deter them from drinking and driving.

Q. Now Colonel, have you seen any data of any kind which would indicate to you that these roadblocks are effective as a deterrent?

A. Yes.

Q. You have seen data?

A. Yes.

Q. What have you seen, Colonel?

A. Well, I have seen some reports out of Maryland and Delaware, and hear testimony by people from Maryland and Delaware. I have seen one brief report out of Illinois which spoke to the costs of arresting drunk drivers. Cost analysis between general patrol and checkpoints.

Q. Maybe I should change my questions slightly.

Before you implemented these roadblocks, Colonel, had you ever seen any data, any empirical data which indicated to you these roadblocks had a deterrent effect?

[85] A. What I saw, seen, indicated we had testimony from the Drunk Driving Task Force from the State of Maryland. And I recall some papers brought along — based upon the testimony I was convinced they were at least worth looking at.

Q. My question again as to data, I don't mean to belabor, it is true, isn't it, you never actually saw any data other than you are taking the people from Maryland and their word these things have been effective?

A. I would say that is true.

Q. All right. You yourself haven't seen any statistical analysis in order to determine these would be an effective deterrent?

A. I personally have not.

Q. All right. Do you know what the arrest rate in Maryland has been?

A. No.

Q. Do you know whether or not the rate of Maryland — excuse me, rate of fatalities in Maryland was effective, vis-a-vis the checkpoint program they used there?

A. I don't recall anyone.

Q. You don't recall any more — was there a time you did not?

[86] A. As I indicated, I had seen it on testimony from the State and these statistics have been brought up. I don't recall what they are any more.

Q. It is true, isn't it, you haven't actually read and reviewed yourself studies out of Maryland?

A. No.

Q. Vis-a-vis the checkpoints, is that correct?

A. No, that is correct, I have not.

Q. Is it correct in Michigan they are basically utilizing the Maryland program as a model?

A. Yes.

Q. Is it true then actually you don't have any evidence or data these checkpoints would be an effective tool in Michigan?

A. To have hard evidence and data, I would say that is correct. We are attempting to develop here in Michigan.

Q. Okay. And really you are just hoping here in Michigan they may have effect, is that true?

A. I think they will have effect.

Q. You base that on no data or evidence of an empirical nature?

A. Not of an empirical nature.

* * *

[94] Q. Now, what is the plan, Colonel, with regard to number of roadblocks set up on any given weekend night in the State of Michigan?

A. We are incidentally only prepared to do one at a time.

Q. Is it correct you will announce in advance to the public the County that the roadblocks or checkpoints will occur in?

A. Yes.

Q. How will you do that?

A. By notifying the media, both papers, radio and television.

Q. How much in advance of setting up the check lane do you give notice to the public?

[95] A. Some time in the twenty-four hour period.

Q. You anticipate the media will disseminate this information to the public, is that the plan?

A. Yes.

Q. It is your opinion at this time to implement the checkpoints on expressways?

A. No.

Q. And what is your plan with regard to utilizing checkpoints during bad weather?

A. We would not use them during bad weather.

Q. You would simply not set them there or call them off if bad weather occurred?

A. Yes.

Q. That would be true of both rain and snow conditions?

A. Yes.

Q. Now as a driver comes through this checkpoint, Colonel, who actually is the individual whose questioning and talking to the drivers as your plan is set up?

A. A trooper, deputy, City police officer.

Q. It would be any one of the personnel that were on the scene, it would be a State Trooper, police officer, county sheriff, or it could be a township [96] police officer?

A. Yes.

Q. Who is it that makes the decision as to whether or not the individual driver who has now been stopped will be pulled over for the further questioning and/or testing?

A. The officer who makes initial contact.

Q. It's the State Trooper, the County Sheriff or the township police officer?

A. Yes.

Q. It's up to that individual to make the assessment?

A. Yes.

Q. And to use their own discretion in that regard?

A. Yes.

Q. And are they supposed to look for certain things when the car pulls up?

A. They are looking for intoxication.

Q. They're supposed to make their own assessment as to what is indicated?

A. Yes.

* * *

[125] Q. Would the rank of the sobriety checkpoints diminish or impact significantly on any of the other programs?

A. In the way we are doing it right now, by using a core, a group of troopers, it will have a very, very minimum, if any, effect on the other posts or areas, as we use sheriffs, townships or city, whatever, they schedule overtime to do that, or they put their officers out there on general patrol, could have impact during that particular time period of the sobriety checkpoint.

* * *

[141] Q. To your knowledge, in the Maryland study, the part you reviewed, the check lanes are not an effective tool for arresting drunk drivers?

A. They have not relied upon the number of arrests to judge the successfulness in my understanding.

Q. So when you testified earlier there is no data which would show whether or not this deters or does not deter out of Maryland, it is also true there is some data which does speak to the effectiveness vis-a-vis the Maryland case, correct?

A. I understand there's no data out of Maryland or Delaware, both. I do not recall any of it.

[Testimony of William H. Hackel, Transcript vol. I]

[143] WILLIAM H. HACKEL, having been duly sworn by the Clerk of the Court, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GAGE:

Q. State your name, please:

A. William Hackel.

Q. Your occupation and profession?

A. I am Macomb County Sheriff.

Q. How long have you held that position?

A. My tenth year.

Q. Prior to that time, what did you do?

A. A member of the Sheriff's Department as a deputy [144] sheriff in supervisory capacity for the past twenty-three years.

Q. And you have been Sheriff, as you said, for ten years, I'm sorry?

A. Yes.

Q. You are also involved in the Michigan Sheriff's Association?

A. Yes, I am.

Q. How long have you been in office in that association?

A. Yes, sir.

Q. What is that office.

A. I'm currently president of the Michigan Sheriff's Association.

Q. How long have you held that position?

A. The past ten months.

Q. Sir, are you charged as Sheriff in Macomb County with the duty of enforcing the drunk driving laws in the State of Michigan?

A. Yes, I am.

Q. Have you developed or adopted any programs in Macomb County for the purpose of detecting and reducing drunk driving accidents and fatalities?

A. In addition to the routine function of the deputy sheriffs on patrol, we have a program in Macomb County that I project, Alcohol Detection Project, which is [145] Federally funded to pass through the offices of the Highway Safety Planning, which is housed in Lansing. I think it's in the Department of State Police have provided us with funds to be disbursed throughout Macomb County. And I disburse these funds to every law enforcement agency in Macomb County.

Q. And what is the method used in that program with reference to reducing fatalities in accidents as a consequence of intoxicated drivers?

A. We use the statistical information that showed up where in Macomb County drunk drivers cause accidents that cause injuries and fatalities. We identify these highways and the days of the week and the hours of the days that these

accidents were caused by drunk drivers. And what we did is we took this money and we scheduled additional officers, deputy sheriffs and city and township police officers at every time basis, to adequately enforce for the specific crime.

THE COURT: As an aside, Sheriff, how do you determine the high accident areas? Do you do your own work or through the Michigan State Police?

THE WITNESS: That information was developed and was obtained through the Michigan State Police.

(By Mr. Gage, continuing)

[146] Q. How long have you been conducting such an accelerated patrol program?

A. Two and one-half years.

Q. Do you have an opinion as to its effectiveness?

A. Well, I believe it is effective, I know it is effective in making arrests. The number of drunk drivers has increased tremendously. The officers are, I believe because of their inter-action with the program, are more attuned, have been trained in how to identify and arrest drunk drivers. And it's a program the requires the officers to be effective and to look for the drunk drivers. I think the arrest statistics have shown a drastic increase. I don't have them with me. But I know that they show substantial increase in arrests for drunk drivers in Macomb County.

Q. During the period for this special program?

A. Yes, sir.

Q. You are aware that the Michigan State Police have

instituted a so-called Sobriety Check Lane Program in this State, is that correct?

A. Checkpoint Program, I believe so, yes.

Q. Checkpoint or Check Lane, and it is your understanding that it is your understanding that this would be a stop of all vehicles approaching a certain area of [147] the roadway?

A. As I understand it, the plan works where you stop every vehicle that comes down the highway. That's my understanding of the Checkpoint Program.

Q. Is it further your understanding that approximately eight to twelve officers to be involved in that process and State plan?

A. That's what I'm led to believe, yes.

Q. Based upon your twenty-three years of experience, and based upon your twenty-three years as Sheriff of Macomb County, and do you have an opinion as to whether or not the Check Lane System as proposed to be utilized by the Michigan State Police, is a more effective method of deterring and/or arresting drunk drivers and reducing deaths or injuries from drunk driving?

A. As compared from other programs?

Q. As to — I'm contrasting to patrol or any other program that you are aware?

A. I believe there are more effective means of arresting drunk drivers, and the utilization of that kind of manpower, I think there are more effective ways to do that.

Q. What are there more effective ways than check lanes?

A. A similar program, such as are done in Macomb County, [148] we are not the only County that does them, where you target these areas, and the officers are trained to identify people that appear to be intoxicated and pull them over and make arrests after the proposed checks are taken, or any other violations of law that occur. I think it's a more effective — there are more effective ways of dealing with the drunk driver program. And at the same time other law enforcement functions can be looked into also.

Q. In other words, if a program is directed primarily towards arresting or detecting drunk driving, and the officers who are engaged in that activity at that time are not engaged in other investigatory activities, then you deem that to be less effective use of the resources; is that correct?

A. I'm not exactly clear on what you just said.

Q. I'm wondering, you indicated in your answer that the officers in concentrated patrols, would also be patrolling for other purposes other than just drunk driving; is that correct?

A. Yes, the primary objective and reason for the funding is to apprehend drunk drivers. But, under our program they're not precluded from making any other arrests or taking care of any other violations. My understanding of the Checkpoint is that eight to [149] twelve officers that are utilized are only allowed in my opinion, with their hands severely tied, to deal with persons that they feel are intoxicated, and as I understand, that is about all they are allowed to do. I think the other programs do that, too. And I think it's more effectively, and they are free to take care of other activities that come within their observation.

Q. Sir, if you were allocated a certain amount of money to cover the cost of a Check Lane Program, but you had the

discretion to utilized these funds in some fashion other than the check lane, as administrative, would you choose another method of drunk driving enforcement, other than check lanes?

A. Yes, I would.

Q. The reason that they're more effective?

A. I think they are more effective and more efficient use of manpower, the other programs are.

Q. Thank you very much, sir. I have nothing further.

CROSS EXAMINATION

BY MR. O'BRIEN:

Q. Is it Sheriff Hackel?

A. Yes, sir.

Q. Sheriff Hackel, you have indicated that you are the president of the Michigan Sheriff's Association; is [150] that right?

A. Yes, sir.

Q. Does the Michigan Sheriff's Association oppose the Sobriety Checkpoint?

A. The Association has no position on that issue.

Q. If, as a result of having run this pilot program, that in Michigan, these prove to be effective in regards to either deterrent or arrests, would you be willing to try them in Macomb County?

A. Well, if — I am sure any Sheriff like myself, if we felt that the checkpoint lane or any program was the best alternative to deal with the drunk driving problem, then I'm sure that that will be considered and probably utilized.

Q. Were they proven effective in deterrence, would you wish to use them either on a trial basis or permanent basis?

A. If they have proven to be a deterrent, is that what you said? Would I be willing to use them?

Q. Would you wish to use them as either a temporary program or as an alternative, a permanent program?

A. (No response.)

Q. In your county?

A. From what I know today, what I understand about checkpoints or check lanes, I would prefer to use the [151] program that we use in Macomb County now. But, you said was that if it was shown to me as a law enforcement administrator that the checkpoints or check lanes were more efficient use or more effective use of manpower, then certainly that would be a consideration, and any police administrator would have to take into consideration probably utilizing that. That's what we do, we try to figure out what is the most effective utilization of our manpower, because of our limited resources.

Q. Certainly. I understand you have not implemented sobriety checkpoint ever in the past in your county; is that true?

A. Not to my knowledge.

Q. You have no personal data in regards to whether they would be effective, or at the time, not of our own data in Macomb County?

A. That is true, I do not.

Q. Are you aware of a study that was done in Oakland County, which borders Macomb County, that had concentrated patrols in certain areas?

A. I'm aware that Macomb and Oakland County has had an alcohol program. I'm not aware of the specifics of the program.

Q. Do you known what the result of that stepped-up patrol [152] program was that was instituted in Oakland County?

A. No, I do not.

Q. Now, there has been some questioning here whether Sheriff's deputies have the sufficient training or knowledge in order to determine somebody who's been drinking? What type of training do your people get in regards to detecting a drinking driver?

A. Well, we all go through the deputy sheriffs and the State Troopers and the city police and the village police, all basically go through the same Police Academy originally, where you receive your basic training. And then, of course, you receive the additional training, and your street officer of some experience, what you do is you learn through experience to detect whether or not a person is too intoxicated to drive. You learn by what you observe and what the breathalyzer results show. And over time I think there's a knowledge acquired there.

Plus, we utilize Macomb County this device called a preliminary breath tester, which is an indicator that is provided through this grant I was talking about in Macomb County to every law enforcement agency which assists the officer, whether they're deputy sheriffs or city police officers. They make a stop for someone suspected of drunk [153] driving. You utilize this preliminary breath tester and it is further tool

to aid the officer in making a decision whether to bring the person in to jail, the County lockup or whatever to take more breathalyzer tests.

There is additional training given, particularly in the area of preliminary breath testers and the program has been training officers. We provide through our department as a result of our grant.

Q. Based on your personal knowledge, and as president of the Michigan Sheriffs' Association, do you have an opinion whether sheriffs' deputies throughout the state would be capable of participating in a sobriety checkpoint such that they would be able to make the same type of judgments in regard to viewing somebody and determining odor and et cetera, whether that particular person goes through a sobriety checkpoint has been trained?

A. Well —

THE COURT: Pretty convoluted question, isn't it?

MR. O'BRIEN: Let me rephrase it.

Thank you.

THE COURT: Do you think your sheriffs [154] can do as well as the State Police in picking out a drunk driver?

THE WITNESS: If that's the question, the answer is definitely yes.

MR. O'BRIEN: Thank you, Your Honor.

THE COURT: We are here just to please.

(By Mr. O'Brien, continuing)

Q. From your concentrated patrols, have you amassed your data into a study?

A. It is being amassed into a study. The program is a three year program which ends on September 30th of this year, and knowing the Office of Highway Safety Planning, some months after the program ends in getting a rather thick document together and they will tell us in their opinion whether it was a success or not.

Q. Based on the number of drunk driving fatalities in your county, have you already been able to determine whether or not this has a deterrent effect?

A. Well, the statistics are an interesting thing. In my opinion, I think it had an impact. And again, I would base that upon last year's positive record meaning fewer fatalities last year. That makes me feel good, that maybe this program we have is responsible for it. I learned a long time ago that [155] it's very difficult to plug out any one thing and say that is the reason for success or reduction of any problem or crime. So I'm interested in this final report.

Q. Each of the three years that you have had this program going, have you — your drinking and driving statistics in regards to fatalities have gone down?

A. I'm not sure that I can say that. I could tell you our arrests have gone up again on statistics.

Q. That's my question, can you tell me whether at this time they have gone down?

A. Again, that's the kind of answer that you can't give until you have the final data. You will have — I think you are well aware that final information whether or not it's regarding fatalities or accident situations or crimes, usually wind up a year behind when you would like to know the information.

Okay, what I can tell you here is that our arrests have gone up.

Q. So again, we have to interpret that at this point, you know, that arrests have gone up, you don't know the deterrent effect, you're waiting to see what the report says?

A. Yes, sir.

Q. And once more, if it turns out that sobriety checkpoints [156] while perhaps not increasing arrests, does help in the deterrence of fatalities, would you be willing to augment your present program with this program?

THE COURT: I think he's already answered that, Mr. O'Brien. He's willing to look at any successful program.

MR. O'BRIEN: I have no further questions.

THE COURT: Sheriff, what is your idea of the main purpose of check lane or checkpoint process?

THE WITNESS: Well, as I understand, it's main idea of the checkpoint, I'm going to base it upon what I understand about check lanes.

THE COURT: I am asking for your thinking.

THE WITNESS: It is one, to a deterrent program, first of all. I think that probably might be the one thing that I would think of, if anything you could give it credit to. And it secondly would be to apprehend drunk drivers that come actually through the checkpoint.

I'm skeptical as to how effective that will be, based on what I understand the restrictions placed on the officers are

that work it. I would think that a checkpoint, if I had to [157] give it some merit in my opinion, it would be to the media attention given to it more than the actual application. That would be my opinion.

THE COURT: Thank you, Sheriff.

REDIRECT EXAMINATION

BY MR. GAGE:

Q. Just a couple of questions. The Michigan Sheriffs Association has in the past come out opposed to check lanes?

A. Check lanes, yes, sir.

Q. Since that time, has Colonel Hough visited the meetings of the Sheriffs Association?

A. Yes, he has.

Q. Did he keep trying to explain the difference between check lane and checkpoints, this information bring to you at the meeting between these two entities?

A. Yes, and I think it was February of this year Colonel came to our board of directors meeting and asked us to support the checkpoint concept.

Q. As opposed to check lane?

A. (No response.)

Q. Did he explain the checkpoint as opposed to check lane?

A. Well, he said it was different, and it was in the process of being developed. But that would be somewhat different than check lanes, yes.

[158] THE COURT: Did he tell you what the difference was?

THE WITNESS: No, sir, in answer to that he did not.

(By Mr. Gage, continuing)

Q. Did you take a vote on whether or not you would support this new program he did not explain to you?

A. Well, no, what I did as president of the Association, I really precluded the board from taking a vote. It seemed to me we couldn't convene on that if we didn't know what it was. What I did was I assigned somebody to monitor the development and the program and when it was formulated, it would come back to the board of directors or the Michigan Sheriffs Association, and at that time we would look at what the checkpoint was, and we would then take a formal vote. This is not occurred yet.

Q. That will take place some time down the road?

A. I assume so.

Q. Without statistics and figures or anything else, but drawing upon your twenty-three years in which you understand to be sobriety check lanes or points of operation, is it still your opinion that there are more effective methods of police utilization of police resources for reducing drunk driving; is that [159] correct?

A. Yes.

Q. Thank you, sir. I have nothing further.

MR. O'BRIEN: I have nothing further.

THE COURT: Thank you, Sheriff.

MS. GORDON: We will call Sheriff Thomas Edmonds, Thomas M. Edmonds.

THOMAS M. EDMONDS, having been duly sworn by the Clerk of the Court, testified on his oath as follows:

DIRECT EXAMINATION

BY MS. GORDON:

MR. GAGE: I'm sorry, is the witness free to go?

THE COURT: Any reason why Sheriff Hackel can't be excused?

MR. O'BRIEN: No, Your Honor.

MR. GAGE: Thank you, Your Honor.

[Testimony of Thomas M. Edmonds. Transcript vol. I]

[159] DIRECT EXAMINATION

BY MS. GORDON:

Q. Sheriff, would you please state your full name and your current position?

A. Yes, ma'am. My name is Thomas Edmonds, I am Sheriff of Kalamazoo County.

Q. How long have you been Sheriff of Kalamazoo County?

[160] A. Since June 25, 1984.

Q. Prior to that time, what were you doing?

A. I was Undersheriff of Kalamazoo County from June 1st, 1981.

Q. And prior to becoming Undersheriff, what were you doing?

A. I was Assistant Prosecuting Attorney for the County of Kalamazoo.

Q. How long had you been Assistant Prosecuting Attorney?

A. From October of 1975.

Q. How many sheriffs deputies are in your department?

A. We have one hundred sixty-seven employees. I believe one hundred ten of them are sworn.

Q. One of your duties as Sheriff of Kalamazoo County is to enforce the law with regard to drunk driving in the State of Michigan?

A. Yes, ma'am.

Q. Okay. Have you attempted to do that in Kalamazoo County?

A. Absolutely.

Q. How have you attempted to do that?

A. In the traditional fashion of road patrol using uniformed officers in marked cars, and we have from time to

time had occasions to enforce these laws, to use many concepts. The primary thrust is to use [161] patrol people to observe for more violations of the law.

Q. Have you had directed patrols at any time?

A. Directed patrols? Since my employment, we have not had a grant that specified directed patrols, so no, we have not in my tenure.

THE COURT: What kind of a patrol?

THE WITNESS: Directed, specialized.

(By Ms. Gordon, continuing)

Q. Would you tell us, please what a directed patrol compared to non-directed?

A. Certainly. I think that at least my understanding would be that directed patrol would be any patrol which is specifically targeted for a type of offense or type of activity, i.e., selective traffic, pursuit of OUIL. Non-directed is patrol time in the discretion of the officer, within the certain departmental policies where they go and what they do.

Q. Do you view your patrol system to be an effective way of combating drunk driving in the County of Kalamazoo?

A. Given our statistics comparison with the Defendant, we are — yes, we are very successful. In comparison of national averages as a factor or not, something that I can't say. But we do the best we can. I think [162] our efforts are worthwhile and effective, yes.

Q. What do you do as a positive factor in your non-directed patrol system you use?

A. As relates to OUIL?

Q. Yes.

A. As it relates to drunk driving enforcement of non-directed patrols gives us the ability to reach out through the entire County and to be in specific areas we know to be from the accident investigation information, particularly susceptible to drunk driving accidents. At this time these appear to be predominately the same, and gives us ability to be on a number of roads and within the County, and moving, which gives us another advantage to be able to observe actual driving for drinking driving or for other difficulties with the driver.

Q. Are you familiar with the concept of Checkpoint or Check Lane Program in order to stop all drivers to apprehend those who have been drinking?

A. Yes, ma'am.

Q. Are you familiar with the case currently set forth in these guidelines in the State of Michigan through the Michigan Department of State Police?

A. Yes, ma'am.

Q. How are you familiar with that?

[163] A. Some time ago I was contacted by the Director, Colonel with the Fifth Police District to see if I'm willing to participate in test of sobriety check lanes within Kalamazoo County and in conjunction with the State Police. As a result of the subsequent discussion I agreed with the Director I would so participate and I was then asked to participate on a committee to advise the Director on the promulgation of the guidelines for the proposed test. At the same time I agreed to do that, I was appointed or approximately at the same time, appointed by the Sheriff Hackel, President of the

Michigan Sheriffs Association, as Sheriff of the Association, a liaison to that group, advisory group I had been involved in in promulgation of these guidelines. And I have what I believe to be a copy of the most recent guidelines.

Q. To you that's an advisory group; is that true?

A. I guess that's the title for it, yes, ma'am.

Q. Prior to becoming on the advisory committee, had you taken a position with regard to the efficacy of the use of sobriety checkpoints or check lanes?

A. Yes, I believe, I can't tell you specifically when, but probably a year earlier or so, I was asked by someone in the local media whether I had a stand, [164] publically, and I do not remember the person. I had a position and did take a position, yes.

Q. What was that position?

A. At that time I indicated I felt that sobriety check lanes were not as effective and would not be effective as road patrols in the apprehension of drunk drivers and the deterrence of drunk driving.

Q. Did you at some time communicate your point of view to the Director of the State Police and the Department of State Police?

A. I'm not certain I communicated to the Director, I know I communicated to State Police Officers as high as the rank of Captain, socially and not formally. I don't recall taking a particular position during —

Q. — Prior to taking that and prior to having been on the advisory committee, did you make your own position known to the Department?

A. Yes, I did, because I did discuss it with Captain Bellaire (phonetic), Robert Bellaire (phonetic), Director of Michigan State Police, the gentleman that approached me initially, and I do recall discussing it with him.

Q. Based upon what you have now reviewed as part of the advisory committee and your understanding and experience on the committee, and your having observed [165] and heard about the guidelines and the implementation, have you changed or sustained with regard to your opinion of the use of sobriety check lanes and checkpoints?

A. No.

Q. You continue to take the position they are not an effective tool for getting at the drunk driving problem?

A. Not as effective as the method we are now using, in my opinion.

Q. Okay. With regard to your desire to have such a checkpoint program set up in your County, in conjunction with your Sheriffs Department, what is your opinion on that?

A. I'm still willing to participate in a test of the process, because I feel that the best way for a full evaluation and develop the issues, that way we can decide whether it is reasonable or not.

Q. But left to your own decision, and ultimately using your own money and resources, within your own County, is it your opinion that you would utilize this sobriety check lane or checkpoint as a technique?

A. Based upon what I know now, I now believe I would not establish as sobriety checkpoints nor would I recommend one, if that were in lieu of expending these [166] resources available on patrol.

Q. Did you make a recommendation to the Michigan Sheriffs Association with regard to the use of sobriety checkpoints or check lanes?

A. No, I have not.

Q. Are you planning on making a recommendation?

A. Not as to regards what the practice is, maybe I will go to the summer conference.

Q. At this point, were your recommendations — strike that.

Are you aware in 1984, the Michigan Association of the County Sheriffs took a position against the sobriety check lanes or checkpoints?

A. Yes.

Q. And in those recommendations, would they be for the same position to be taken by this Association?

A. I have not formulated a recommendation to the Association. I did not at the past meeting and I can't tell you when I'm going to recommend to the Association.

Q. Talking about Kalamazoo County for a moment, the County itself, is it correct this is a rural County in some areas at least?

A. We have a total County population of approximately two hundred twelve thousand. We have urban areas [167] and agricultural areas and say percentage of Kalamazoo and Township of Kalamazoo, respectively, population of 4070 and twenty-five thousand. We have both urban and rural population. The remainder of that would be in villages and towns and urban environment.

Q. Do you have an opinion with regard to the effectiveness and cost effectiveness of the use of the checkpoint program in the rural areas of Kalamazoo County?

A. They are not ready to, in my opinion, adaptable to rural environment. They're not going to be effective there.

Q. Why is that?

A. Not enough traffic.

Q. I don't have any other questions, thank you, Sheriff.

CROSS EXAMINATION

BY MR. O'BRIEN:

Q. Sheriff Edmunds, have you ever had sobriety checkpoints in your County?

A. Within my personal knowledge, no.

Q. My understanding you have not directed patrols or concentrated patrols in any certain areas?

A. From time to time we direct patrols attention, but not the area of OUIL enforcement, not during my tenure, no.

Q. Do you have and do you use the MALI System?

[168] A. It is used within our Department, yes. I am familiar with it.

Q. How is it used in your Department?

A. As best I know, the information that is obtained, that MALI issued by our traffic patrol, compared in this, traffic especially to determine areas that we may want to concentrate on, and that specific times because of accident frequency.

Q. Do you have these types of areas within your County where there is a high incidence of alcohol-related accidents and concentrated within a short time span?

A. I believe so, I believe some of it is identified in this process.

Q. And then your initial talks with the State Police, were some of these areas being considered as the first sobriety checkpoints?

A. Absolutely.

Q. Assuming that the first checkpoint was a formal checkpoint, and only gone on for say one hour, and there were the expected eight to twelve people there, where they would have had an arrest record of say two arrests for at least say twelve manhours, based on your experience, is this —

THE COURT: Twelve manhours?

MR. O'BRIEN: Yes.

[169] THE COURT: Going through the mathematics on that again, I think you lost part of your question.

(By Mr. O'Brien, continuing)

Q. On May 17th, the checkpoint only lasted one hour. The expected participation at one of these checkpoints is between eight and twelve officers. Assuming then that there was two arrests for twelve manhours, based on your experience in your County, would that be a good use of manpower?

MS. GORDON: Excuse me, I object to that, assuming facts not in evidence. The fact is there was a list of nineteen officers on the scene and they effectuated two arrests, and that the check lanes operated for a longer period of time.

There was a set-up and a debriefing period involved. I think his question is speculative and it does assume a whole set of facts that have nothing to do with the reality of May 18th checkpoint.

THE COURT: I think the Colonel said there was a number of people there for observation and normally probably wouldn't have the briefing and debriefing. But because of the novelty of the concept at least, they went into that. I will allow him to answer the question.

[170] MR. O'BRIEN: Thank you.

THE WITNESS: It is still somewhat difficult perhaps to answer. The best I can give, Mr. O'Brien, is that I can't have a real concrete grasp of the statistics where you're speaking two arrests for twelve manhours.

(By Mr. O'Brien, continuing)

Q. Yes.

A. I can tell your from review of some patrol statistics I made on the way here, depending on the shift, that would probably be either, have effective or perhaps ineffective depending on our shifts. Obviously our day shift does not experience the OUIL arrests that the eight P.M. to two in the morning crew is going to. And the same with afternoon, they pace up a little bit. We may — I can give you numbers, perhaps you can answer the —

Q. What is the base line or average number of manhours per drunk driving arrest?

A. This statistic I can quote you is that in the months of March and April of this year we averaged point nine drunk driving arrests per officer total in the Traffic Patrol Division per month.

Q. How many — that's for this whole months time, you did one point or point nine arrests?

[171] A. That is assumed he was even there, that's just based on numbers. We made approximately one hundred forty-three arrests a day.

THE COURT: I have a problem with your question, Mr. O'Brien, prior to the man element that you omitted from your question. If we take a look at it, it seems to me the population in the County and the numbers of officers and all the rest of it, as well as the time that the arrests were made. I'm not sure I understand the answer the the question and I'm not sure what it means here today.

MR. O'BRIEN: Well, if we could get the data or statistics as to the times specifically in the same situation, I would ask that, Your Honor. I don't think that's available.

THE COURT: Maybe bring it up with the Sheriff of Saginaw County, maybe he would know it in his County. The only thing we have gotten from this Sheriff is that as a means he has never used it and he's not likely to use it at this point.

MR. O'BRIEN: I understand that, Your Honor. We do have these statistics, however, and we will provide them to the Court.

THE COURT. All right.

(By Mr. O'Brien, continuing)

[172] Q. I understand you have a legal background and you were Assistant Prosecutor?

A. Yes, sir.

Q. You sat on the committee that drafted the Sobriety Checkpoint Guidelines?

A. As advisor to the State Police, yes.

Q. Did you have any input into any of the procedures to be followed in regard to the stop and what should go on during that period of time?

A. Yes, sir.

Q. What was your input?

A. I would have to review, I apologize, they're in the car, my notes from each meeting. I can give you my best recollection of the areas within which I had specific recommendations. I had recommendations regarding who was on the scene. Simply whether the guidelines were appropriate to say that a State Police Officer would be in command. I suggested there would be at least cooperative efforts. I also specified recommendations, as I recall, regarding some of the safety aspects as to the placement and configuration. Some language changes. I don't think it changed the actual import of the guidelines.

And I believe I had some concern about [173] the procedures used in the contact. I can't specifically remember what I recommended, but I do remember making recommendations in that area about the nature of activity of the officer who had contact with the stopped citizen would take.

Q. Why did you recommend that a command officer be present?

A. I simply — the original guidelines indicated a command officer would be present. My concern was that because we were proposing to use more than one department, perhaps as many as three for that matter, the protocol

amongst police officers that the senior officer there, had to be at least a lieutenant from the State Police. If he or she were going to command a checkpoint, I would not be sending a sergeant to work for a lesser rank officer from another department.

Q. What specifically about the configuration did you recommend changing?

A. That's difficult right now, as I recall, the best of my recollection had to do with how far back the vehicle was stationed where the first warning point was to give notice. And we talked about standardizing the flashlight cones to the minute detail. I felt it was important they would all [174] look the same. They could not be contrasted with an ordinary road cone. These are little reflectors and flashlight traffic director devices. I did have discussions regarding whether they should pursue a vehicle that fled. I can't remember my exact position. My position at the time, I believe was that if they were driving indicating a problem, we should definitely pursue on reckless or careless driving violation or bad driving.

Q. Do you recall what procedures in the contact recommendation was?

A. That it had to do with the acctual statements made by the officer making contact. I think it was, I recall it was revision of language related to whether the person identified himself as an officer or trooper. I believe I suggested they make that over into those participating departments and they would not need to modify the title.

Q. Do you have a question in your mind that, whether the sheriff's deputies are as well trained as State Police Officers in regard to identifying drinking drivers?

A. I really can't speak for eighty-two other counties,

from personal knowledge, my — I have an opinion. I have a conviction that our officers are as well [175] trained on the average as anyone in the business in the State, including the State Police.

THE COURT: Well, we only have eighty-one more counties to come up with, Mr. O'Brien. I'd be surprised if there'd be any other answer from any other county.

MR. O'BRIEN: No, Your Honor, that was not why I asked it.

(By Mr. O'Brien, continuing)

Q. You have not conducted the sobriety checkpoints in your County today. If, based on this pilot program they prove to be effective both in arrest and deterrence, would you be willing to try them in your County?

A. Yes, sir, and I would be willing to participate as I said, even prior to that proof. I feel if they have some deterrent value, they do make arrests. And I know what they can do, and as time goes on if they're beneficial, if it's offered, I'll take it.

Q. I have no further questions.

REDIRECT EXAMINATION

BY MS. GORDON:

Q. Just a couple of follow-ups, Sheriff. On your last comment, did you mean that if it's offered as a free pay to your County, and the police will come in and [176] so it's not a reallocation of your own resources, you're willing to try it?

A. If it had — my first choice would be to place these

resources in patrol. But yes, if I have that additional option and to bring in the other benefit of assistance without cost, certainly I'm going to ask for it.

Q. Thank you. No further questions.

THE COURT: Thank you, Sheriff Edmonds. We appreciate you being here today.

THE WITNESS: Thank you, Your Honor. I appreciate your patience. (Whereupon the witness spoke to the Court Reporter.)

[Testimony of Robert Ficano Transcript Vol. I]

[176] MR. GAGE: The Plaintiffs call Robert Ficano to the stand.

ROBERT FICANO, having been duly sworn by the Clerk of the Court, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GAGE:

Q. State your name, please?

A. Robert Ficano

Q. Your occupation and profession?

A. Sheriff, Wayne County.

[177] Q. How long have you held that position?

A. Three years.

Q. What position have you had during that time?

A. Deputy in charge of Wayne County.

Q. The last three years you have been in charge of the Sheriffs Department of Wayne County, charged with the enforcement of drunk driving laws in the State of Michigan; is that correct?

A. That is correct.

Q. Is Wayne County one of the largest counties in the State of Michigan?

A. I believe it is the largest county in the State of Michigan.

Q. Have you, during the course of these three years, adopted any specific programs or tailored any directives to the reduction of drunk driving deaths or injuries in enforcement of drunk driving laws?

A. Yes, sir, we have. We have what is specifically known as OUIL Squad, which is five officers. They are assigned to go out and patrol with the primary purpose of alcohol enforcement.

We also have a part of our section a road unit which is a grant from the State of Michigan which is Traffic Enforcement, which also has an obvious impact on the alcohol enforcement. And we [178] also participate in a grant from the State of Michigan on alcohol enforcement, which is distributed, I believe, through the Department of Transportation which permits us to take up overtime in a few additional patrols for alcohol enforcement.

Q. Do you have an opinion as to whether or not these programs have been effective in the County of Wayne?

A. Yes, we feel they have been very successful. We — last year alone I think we made over one thousand OUIL arrests.

Q. All of these programs — you're a lawyer by profession, are you not, sir?

A. That is correct.

Q. Do all of these lawyers — all of the programs require — all of the programs you have discussed and implemented require that your officers have at least an articulable suspicion that the person they are interrogating or stopping is involved in some criminal activity?

A. That's the correct standard, that threshold that they must observe in order to stop a vehicle.

Q. Sheriff, have you become aware of the proposed — in fact partially conducting a pilot program involving the so-called sobriety check lane in the State of Michigan?

[179] A. Yes.

Q. Have you had a opportunity to become familiar with any of the guidelines for that program?

A. I have not seen the guidelines, I just observe or read some articles in the newspaper.

Q. Are you familiar with the check lanes to the extent that you're aware of a certain number of officers from eight to twelve, stationed at a particular location for a period of hours to detect primarily drunk drivers?

A. That is correct.

Q. Based upon your experience in operating this County and directing this County and allocating its resources among these various personnel, do you have an opinion as to whether this is an effective means, an effective allocation of resources in terms of either arresting drunk drivers or deterring drunk drivers from the highways?

A. I am sure that it may be — actually I found the most effective method is the random patrol as it's implemented right now.

Q. Do you have any knowledge that Wayne County has been excluded from the proposed program for —

A. — I have no personal knowledge, no.

Q. What is the basis for you opinion that the more [180] effective method would be the directed patrol that you talked about as opposed to the check lane?

MR. O'BRIEN: Objection, I believe the testimony was random patrol was the most effective. Counsel has just indicated directed patrol.

MR. GAGE: I will stand corrected and refer to the program that you described. Perhaps I used the wrong term, the basis of your opinion on the program you have in use in Wayne County to be more effective than the check lane program in either effectuating arrests or deterring drunk driving behavior?

THE WITNESS: The number of officers that are needed to implement the check lane versus a random patrol that we utilize right now. For example, our OUIL study uses five officers and in one year they were able to make over six hundred arrests. We feel along with some of the summaries, we do get — we get statistics on areas that have high incidences of drinking and alcohol related accidents. And we

will have a tendency to put patrols in these particular areas. And we have found that the officers, they work one person cars, have been very effective in making arrests, statistically.

[181] (By Mr. Gage, continuing)

Q. Have traditional methods of enforcing laws with the assistance of new technology of the computer, are they proving more effective than it has been in the past? Is that your experience?

A. The computer revision, yes, has helped us from the past practices.

Q. Would you, if asked to redirect your resources and your manpower to the check lanes, adopt the program in Wayne County to that effect?

A. At this time we had opportunity about a year ago to look at it. We decided against it. We decided to see how the experience went with the State Police, and any of the results from that at this point, we did not have any plans to adopt such a program.

Q. Thank you. I have nothing further.

CROSS EXAMINATION

BY MR. O'BRIEN:

Q. I believe you just testified you're going to look at the results of the sobriety check lanes that the State Police are — have begun; is that right?

A. Correct.

Q. For what purpose would you look at them?

A. Overall evaluating different techniques for any type of enforcement. We look at any results that any [182] department will try, any new techniques.

Q. If this new techniques proves to be very effective in regards to deterring drunk driving, would you consider using that in your County?

A. If it's proven to me and my staff, we would consider using it.

Q. Only one more question. Do you feel that your sheriffs are as well trained as State Police Officers to detect and determine a driver who has been drinking or under the influence of alcohol?

A. Yes, my deputies are police officers that are very highly trained, and have lots of training in alcohol enforcement.

Q. No further questions.

MS. GORDON: Now we have eighty counties.

THE COURT: We have eighty counties.

REDIRECT EXAMINATION

BY MR. GAGE:

Q. Let me ask you a question. Let's assume that the State Police were, with this computer. They have it in Lansing and they found a designated area within the County that was a high crime area. And they sent out a pilot program to stop everybody walking down the street and somehow they were dispensing with this nasty requirement of suspicion or probably cause. [183] Do you think that would reduce crime,

perhaps in a high crime area if the police were able to stop everyone walking down a certain street?

MR. O'BRIEN: Objection, Your Honor. This hypothetical is based on no facts that are in the record, and is totally outside the balance of this matter.

THE COURT: And yet you have gone into some of the cases and rendered decisions in this area. Nonetheless, I think it is a bit speculative. We will sustain the objection. I guess Judges can do that on their opinions.

MR. GAGE: It's permitted to speculate on opinions, but not in Court.

THE COURT: Isn't that what they have been doing?

(By Mr. Gage, continuing)

Q. Let me ask you, based on your expertise in running this County for the last few years, do you have high crime areas in Wayne County, depending on your definition —

THE COURT: — Running the County? Maybe just —

MR. GAGE: — It would be I just promoted him.

[184] THE COURT: If it's a promotion.

MR. GAGE: It often leads to other things.

(By Mr. Gage, continuing)

Q. Are there — is it a possibility to identify high crime areas, for example a neighborhood that would have a traditionally five fold crime murder rate or robbery rate or drunk driving rate.

MR. O'BRIEN: Objection, Your Honor, as to the relevency.

MR. GAGE: It's clearly relevant to the issues of what we are dealing with. That is whether or not the intrusion into the personal liberties we are here to defend is in fact going to be permitted. And I think one of the things the Court has to consider in its determination —

MR. O'BRIEN: — Objection as to Counsel's —

MR. GAGE: May I be permitted to at least one, to clarify my statement in response to his objection, thank you.

Your Honor is going to have to rule not only on the factual matters which the Court well knows, Your Honor, but to make a determination as [185] to where this is going to lead us. And as to whether or not the danger which is inherent within permitting —

THE COURT: — With all due respect, Counsel, we are going to rule on this case, not on any other case or any other set of facts. This matter.

MR. GAGE: I understand that, Your Honor. The ruling in any case, one has to determine its impact on society. Ruling on any case involves Constitutional Rights. Constitutional Rights are certainly brought into question in this issue.

THE COURT: That's what, Brown versus Texas —

MR. GAGE: — Exactly. One should take into consideration the fact of his ruling in other areas and the legal extent of the kinds of activity that the State wants to engage in here should be explored. It is relevant to the issue.

THE COURT: Quite true, sir, sustain the objection.

MR. GAGE: Thank you, Your Honor.

(By Mr. Gage, continuing)

Q. Sheriff, as you sit here today, and with your experience and background you have no information or no data or nothing to support in your mind the [186] proposition that the said check lanes are more effective than the traditional law enforcement in deterring drunk drivers; is that correct?

A. That is correct.

MR. GAGE: Thank you. I have nothing further.

MR. O'BRIEN: No further questions.

THE COURT: Thank you, Sheriff. I think we will take a very short recess.

(Whereupon the Court recessed at or about 3:55 P.M.)

* * *

[Testimony of Raymond Cotton, Transcript Vol. II]

[36] Q. And what has been the conclusion that you have drawn?

A. The conclusions that the State Police have drawn on the sobriety checkpoints when used in a total effort, that means in combination with other measures, is an effective deterrent against drinking and driving.

* * *

[57] MR. GRANZOTTO: Defendants' Exhibit Number 6. It's marked as page four, would you read that for me, please?

THE WITNESS: "It was also recognized that it would be impractical to expect that the pilot program design would enable the impact of sobriety checkpoints to be measure conclusively, [58] since many other factors affect the level of accidents."

(By Mr. Granzotto, continuing)

Q. You went in, of course, with that idea it was going to be a, conclusively correct?

A. We expected it not to be conclusive.

Q. Did it establish or does it establish that these things were deterrent conclusively to your —

A. — No, it did not.

* * *

[65] Q. Just tell me what the Maryland Police would do to a person who comes under that category?

A. He would be released to — they would be released to go on their way.

Q. They would be passed through the checkpoint, correct?

A. Yes.

Q. They would be asked to pull over to the side of the road, correct?

A. Of course they were.

Q. Asked to exit their vehicle, correct?

A. Yes, they would.

Q. What would happen then?

A. Then investigation of the sobriety could be conducted, certain tests would be administered, and [66] if they were found to be sufficiently intoxicated they would be released to go on their way.

* * *

[Testimony of William Slaughter Transcript vol. III]

[104] Q. All right. During your direct examination you talked a little bit about a number of ways that you have learned to detect drinking drivers while on patrol. Could you specifically enumerate for us please the things that you look for in patrol in order to determine whether or not somebody is driving in an intoxicated state?

A. As far as driving behaviour characteristics

Q. Correct.

A. Numerous driving manuveurs that would indicate a person is under the influence.

Q. Tell us what you will look for, what these are that make you aware of the fact a person might be intoxicated?

A. Probably the most overt would be driving left of the center or weaving within the roadway dropping down into the shoulder of the road. Some more subtle type of behaviour might be erratic braking, improper turning manuveurs. A whole host of others, driving in the daytime with your headlights on.

[105] Q. Dozens of things you can look for, are there not?

A. Yes.

Q. State Troopers are trained to look for these things; is that correct?

A. That is correct.

Q. To be skilled and able to detect who might be driving while intoxicated; is that correct?

A. That is correct.

Q. It is true, is it not Lieutenant, merely the sheer presence of an officer in a patrol car acts as a deterrent to individuals who might be considering driving while under the influence?

A. No, I dont think that's correct.

Q. You don't think it is correct just being in a patrol, marked patrol car down in the highway in and or itself is a deterrent thing?

A. It is a deterrent. I think visibility will always be a deterrent.

Q. It is true, is it not that these roadblocks are not fixed roadblocks are they. They are the — the whole point of them is to move from one location to another on any given weekend?

A. That is correct. That's an option that can be utilized.

Q. But you don't intend as part of your plan these roadblocks will remain in one location throughout the State or over [106] several mixed locations throughout the State?

A. That is correct.

Q. Purpose is surprise is it not, move them around there is element of surprise and lack of awareness on the part of the public as to where they might encounter them?

A. Not as much as surprise as on the premise that a motorist could be stopped at any particular time or location and throughout the county.

Q. To set them on a fixed location a particular more fixed location would defeat the purpose; it that so?

A. Not necessarily.

Q. Why not — Why not if everybody knew between one and eight every single day every week-end of the year wouldn't that have impact on your ability to detect drunk driving?

A. Yes that would. We are not publicizing the actual location. We are — checkpoint would be set up. The general public if their perception of the checkpoint could be at any location within the county.

Q. The question was about permanent checkpoints, whether that would decrease the deterrent effect perhaps?

A. Yes that would be to set up a permanent location.

Q. You were one of the individuals who went to Maryland; is that correct, in order to examine and analyze their program?

A. That is correct.

Q. Okay. It is true, isn't it Lieutenant, you don't have any [107] data from Maryland which in your mind conclusively establishes these drunk driving roadblocks as a deterrent?

A. That is correct.

Q. It is true, isn't it, that your examination of the Maryland program did not convince you it was inconclusive as far as your were concerned; isn't that so?

A. Of the reports I read; that is correct.

Q. Okay. And you had more questions in your own mind that needed answers after you reviewed the Maryland reports and reviewed the data?

A. That is correct.

Q. And you knew, didn't you, there were other factors that you had to take into consideration with regard to any results in Maryland, or the fact their's was going on with regard to other programs and conditions and so on?

A. What are we talking about, specifically?

Q. Other new laws that might have come into play in Maryland, you knew in our mind this could have an effect, for example safety belt laws?

A. That has had an effect, yes, sir.

Q. In the event you never made a definite conclusion either with regard to Maryland and the deterrent effect, did you?

A. That was not my responsibility; that is correct.

Q. It is true, isn't it, you and some other individual and your decision hand some serious questions with regard to this was [108] an adequate way to reduce the number of fatalities when you compare the manpower involved?

A. No that is not correct.

Q. Not true that you discussed this with some people in your division and the question was raised with regard to whether this was an effective way, cost effective way to reduce fatalities?

A. No. I do not recall any such discussion.

Q. You don't remember any general discussion?

A. It was informal discussion primarily that occurred and within my individual section.

Q. You haven't reached a conclusion have you with regard to whether or not this is an adequate way to reduce the number of fatalities vis a vis cost effectiveness?

A. No, we have not. That's the purpose of the pilot program.

Q. Okay. Now taking you back to the scene of the roadblock for a moment, Lieutenant. I would like to talk with you about what would cause one of your officers to actually pull somebody over to the side for further questions. It is true, is it not it is up to the individual officers to decide who and why he or she will pull someone over?

A. That is correct?

Q. Okay. And what do they look for, tell us without using repetive language the source you have talked about previously, give us some of the specifics which would cause [109] somebody at the scene of a roadblock to pull somebody over to the safe zone?

A. Strong odor of intoxicants emanating from the person. If there was any conversation between the officer the driver, to identify this mode of speech. That might indicate under the influence.

Whether his eyes are bloodshot and face is flushed, general appearance. Whether or not he appears to be sleepy confused. General appearance of his clothing, whether they are in disarray. Whole host of number of clues that might indicate a person is under the influence.

Q. You could say any combination of these factors, is that true?

A. Yes.

Q. Is it true merely the odor of alcohol on somebody's breath is not determinative of the fact that a person is driving while intoxicated? Is that true?

A. That is correct.

Q. It is true, isn't it, that simply having your clothes in disarray and disheveled is not an indication you are driving while intoxicated?

A. That is correct.

Q. Having your shirt unbuttoned is not an indication, is it?

A. That is correct.

Q. But you have testified previously, haven't you, that a [110] person driving with his shirt unbuttoned would be a factor or a clue?

A. (No response)

Q. Did you agree with that?

A. No, I would not.

Q. Let me ask you this, do you feel that somebody driving through with their shirt unbuttoned might be giving an indication they are driving while intoxicated?

A. Taken into consideration with other factors, it could possibly enter into an officer's decision whether to investigate further; that is correct.

Q. Without it — but isn't it lieutenant, any one of these factors alone can be enough in the conduct of your program to pull somebody over?

A. No, that is not correct.

Q. It is true, any one factor could be enough?

A. That is correct.

Q. Up to the individual officer isn't it?

A. That is true.

Q. He did say that the shirt being unbottoned is a clear sign of intoxication he or she will pull the individual over wouldn't they?

A. No they will not.

Q. Why not?

A. I think the officer is experienced, he generally knows that [111] one individual factor is not enough that would indicate, give him probable cause to believe that the person is under the influence.

Q. Bottom line, Lieutenant, it is up to that individual officer; isn't it?

A. That is correct.

Q. And you would agree, wouldn't you, just one factor would be enough?

A. No, I would not agree.

Q. Do you remember testifying to something different than that previously? Do you remember taking your deposition on May 27, 1986 at 10:30 a.m. in Lansing?

A. Yes, I do.

Q. Let me ask you these questions and-answers.

THE COURT: Would you like to show it to him?

Q. Do you remember previously testifying Lieutenant any one factor would be enough, could be enough to pull somebody over?

Q. Yes, I do.

Q. Do you remember testifying previously that no factor could be enough to pull somebody over?

A. I think it depends, if I can elaborate.

Q. I will take the answer first. Do you recall previously testifying that no factor, no factor could be enough to pull somebody over?

[112] A. No, I do not.

Q. Let me read the questions and answers I just showed you to refresh your recollection. Question it is true, isn't it officer, if he or she thought it was appropriate to pull this driver over? Answer that is correct. Question, just for one factor? Answer, that is correct. Question or for no factor?

Answer theoretically that is correct.

Do you remember that testimony?

A. Yes.

Q. Do you have a different answer here today?

A. Theoretically no. I do not.

* * *

Supreme Court, U.S.
FILED
NOV 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1897 (1b)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR PETITIONERS

FRANK J. KELLEY
ATTORNEY GENERAL

LOUIS J. CARUSO
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General

PATRICK J. O'BRIEN
Assistant Attorney General
Attorneys for Petitioners

ST AVAILABLE COPY

QUESTION PRESENTED

Where the Michigan courts concluded that the proposed Michigan sobriety checkpoint program addresses an issue of legitimate public concern, that it would have some effectiveness, and that objectively it would be only minimally intrusive, is the checkpoint program facially unconstitutional in violation of U.S. Const Amend IV merely because the Michigan courts also found that it would not be as effective as other law enforcement methods and that it would have a potential for generating subjective surprise and fear in some motorists?

LIST OF PARTIES

The parties to the proceedings in the Michigan courts were the same as in this court except that Petitioner Col. R. T. Davis, Director of the Michigan Department of State Police has been automatically substituted pursuant to Supreme Court Rule 40.3 for his predecessor in office, Gerald L. Hough, the former Director.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
INDEX OF AUTHORITIES	iv
OPINIONS BELOW	vi
JURISDICTION	vii
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	viii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	17
ARGUMENT	23
THE MICHIGAN SOBRIETY CHECKPOINT PROGRAM IS CONSTITUTIONAL ON ITS FACE	23
General Constitutional Principles	23
Fourth Amendment Principles in Traffic-Checking Cases	29
Application of Principles to Michigan Sobriety Checkpoint Procedure	40
The Gravity of the Public Concern	43
Degree To Which Seizure Advances Public Interest	46
The Checkpoints Are Only Minimally Intrustive	62
CONCLUSION AND RELIEF SOUGHT	71

INDEX OF AUTHORITIES

Page

Cases

Almeida-Sanchez v United States,
413 US 266 (1973) .....passim

Bell v Wolfish,
441 US 520 (1979) 24,62

Brower v County of Inyo, 489
US ___, 103 L Ed 2d 628 (1989) 25

Brown v Texas,
443 US 47 (1979) .....passim

Carroll v United States,
267 US 132 (1925) 29

Delaware v Prouse,
440 US 648 (1979) .....passim

National Treasury Employees Union
v VonRaab, 489 US ___,
103 L Ed 2d 685 (1989) 49,51,52

New Jersey v T. L. O.,
469 US 325 (1985) 27

New York v Burger,
482 US 691 (1987) 57

Sitz v Department of State Police,
170 Mich App 433;
429 NW2d 180 (1988) vi

Skinner v Railway Labor Executives
Association, 489 US ___,
103 L Ed 2d 639 (1989) .....passim

Page

South Dakota v Neville,
459 US 553 (1983) 43

South Dakota v Opperman,
428 US 364 (1976) 28

State v Deskins,
234 Kan 529, 673 P2d 1174 (1983) 5

Texas v Brown,
460 US 730 (1983) 26,27

United States v Brignoni-Ponce,
422 US 873 (1975) .....passim

United States v Martinez-Fuerte,
428 US 543 (1976) .....passim

United States v Ortiz,
422 US 891 (1975) .....passim

Statutes

28 USC § 1257(a) vii

MCL 257.625j 1

MCL 257.715 .....viii,3

Constitution

U.S. Const, Amend IV viii

OPINIONS BELOW

The opinion of the Wayne County Circuit Court is not officially reported. A copy of the opinion and order is reproduced in the App. to Pet. for Cert. 26a.

The opinion of the Michigan Court of Appeals is reported as Sitz v Department of State Police, 170 Mich App 433, 429 NW2d 180 (1988). A copy of the opinion is reproduced in the App. to Pet. for Cert. 2a.

The per curiam order of the Michigan Supreme Court denying leave to appeal is not officially reported. A copy of the order is reproduced in the App. to Pet. for Cert. 1a.

JURISDICTION

The trial court's opinion and order were entered June 24, 1986. The Michigan Court of Appeals opinion was entered August 1, 1988. A timely application for leave to appeal was filed in the Michigan Supreme Court and was denied in an order entered February 22, 1989. This Court's jurisdiction is invoked pursuant to 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const, Amend IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

MCL 257.715:

"(1) Equipment on motor vehicles as required under this act shall be maintained as provided in this act. A uniformed police officer may on reasonable grounds shown stop a motor vehicle to inspect the vehicle, and if any defects in equipment are found, issue an appropriate citation under section 728 or 742 to the driver and order the driver to have the defect or defects repaired immediately. In case of an accident a police officer may make an inspection of the vehicles involved in the accident.

"(2) The director of the department of state police shall cause inspection to be made of motor vehicles operating on the public highways to detect defective equipment or other violations of law governing the use of public highways by motor vehicles, operators, and chauffeurs. For that purpose the director may establish temporary vehicle check lanes at appropriate locations throughout the state for checking for inadequacies and violations. A county, city, village, or township police department also may operate a temporary check lane within its limits with the express authorization of the director of the department of state police and under the direct supervision of a designated representative of the director."

Michigan State Police Sobriety Checkpoint Guidelines:

The text of the Guidelines is reproduced in the App. to Pet. for Cert. 132a.

STATEMENT OF THE CASE

The Michigan Drunk Driving Task Force was created by temporary legislation (MCL 257.625j, which expired on September 30, 1985) and was charged with the responsibility of reviewing and making recommendations relative to all aspects of the drunk driving problem in Michigan. In its final report (J. App. 19a-37a) the Task Force made 35 recommendations for combatting alcohol-related traffic accidents, most of which involved broad policy recommendations, public education proposals and suggestions for legislation. One specific recommendation was the implementation of sobriety check lanes. J. App. 35a-36a:

> "PROBLEM 32: Efforts to impact the 'had been drinking' driver involvement in Michigan accidents have centered around the traditional approaches of public information and education, and increased enforcement. While arrests and accidents are increasing, the involvement of the

'had been drinking' driver in fatal accidents has also continued to increase as a percentage of the total. It is imperative that we try new techniques to deter people from irresponsible drinking and driving.

"RECOMMENDATION 32: The Task Force recommends that in concert with the 1983 Report of the Presidential Commission Against Drunk Driving, the National Transportation Safety Board, and the National Commission on Drunk Driving, the use of temporary sobriety checklanes be used on a trial basis. It is recommended that these checklanes be operated within the definitions, goals, objectives and general policies developed by the Task Force."

In his January, 1986, State of the State address, Michigan Governor James J. Blanchard instructed the Department of State Police to initiate a sobriety checkpoint pilot program. This directive was supported by the Office of Highway Safety Planning. In response to Governor Blanchard's directive, Colonel Gerald Hough, then-Director of the Department of

State Police, set up an advisory committee to develop guidelines for the implementation of the sobriety checkpoint pilot program pursuant to the statutory authority of MCL 257.715. The committee, which included representatives from the Petitioner Department of State Police, county sheriffs' departments, county prosecutors' offices, and the University of Michigan Transportation Research Institute, studied the sobriety checkpoint programs of other states and the state case law which had developed since this innovative police procedure was first implemented.

Maryland, for example, had implemented a pilot sobriety checkpoint program in December, 1982, during National Drinking and Driving Awareness

Week. Lieutenant Raymond Cotton of the Maryland State Police testified at the hearing in this case that a survey of motorists conducted during this program found that 97% felt they were not significantly delayed in their journey, 90% believed such checkpoints increased a drunk driver's chance of being detected and arrested, over 90% believed that such checkpoints will deter people from driving while intoxicated, and 87% approved of using such checkpoints. Hearing Transcript, Vol. II, pp 18-22. Based on an evaluation of the feasibility and effectiveness of the checkpoint pilot program, Maryland decided to expand and continue the program. Hearing Transcript, Vol. II, pp 22-24. The Michigan advisory committee studied the Maryland program, among others, in

designing guidelines for the Michigan program.- Hearing Transcript, Vol. I, pp 84-86; Vol. III, pp 29, 68-69 (Testimony of Michigan State Police Director Gerald Hough, Inspector Leroy Fladseth and Lieutenant William Slaughter).

Inspector Fladseth, Chairman of the Michigan committee, testified that they also studied many judicial decisions involving checkpoints, particularly State v Deskins, 234 Kan 529, 673 P2d 1174 (1983), where the Kansas Supreme Court listed thirteen factors to be considered in evaluating the constitutionality of sobriety checkpoints. The Michigan committee attempted to incorporate such considerations in the Michigan Guidelines. Hearing Transcript, Vol. III, pp 12-30.

The Michigan Sobriety Checkpoint Guidelines are printed in full at App. to Pet. for Cert., 133a-164a. The goals and objectives of the program are as follows, App. to Pet. for Cert. 146a:

> "IV. GOALS
>
> "--Deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents.
>
> "--Conduct checkpoints with a minimal amount of intrusion or motorist inconvenience.
>
> "--Assure the safety of the general public as well as law enforcement officers involved.
>
> "V. OBJECTIVES
>
> "--Increase the perception of 'risk of apprehension' in the minds of those drivers who would operate a vehicle while under the influence of alcohol or controlled substances.
>
> "--Ensure that the constitutionally guaranteed rights of individuals are protected.
>
> "--Remove intoxicated drivers from the public highways."

Under the directives set forth in the Guidelines, each checkpoint operation will be selected by the Michigan Accident Location Index (MALI) computer. The MALI system specifically pinpoints every accident based upon intersecting roadways. It considers the driver, day of the week, the time, the weather, and any circumstances involving drinking. This system identifies those counties which have a significant alcohol-related accident problem and determines which sections of roadway within the county have the greatest problem. Once the roadways within a county are identified, Petitioner Department of State Police must review the sites to determine whether they comply with the safety and convenience criteria set forth in the Guidelines, App. to Pet. for Cert. 149a.

Each sobriety checkpoint is to be publicized through the use of local media prior to the checkpoint operation so as to enhance the deterrent effect among potential drunk drivers. Although the exact time and location of the sobriety checkpoints will not be made public in advance, their use is expected to receive wide publicity. An actual checkpoint operation is expected to last approximately two to four hours, depending upon the MALI-identified drunk driving period and the activity experienced.

The sobriety checkpoint is set up by placing reflectorized signs announcing in sequential order: "Sobriety Checkpoint Ahead," "Reduce Speed," "One Lane Road Ahead," and "Be Prepared to Stop." These signs are to be set in front of the

checkpoint and separated by intervals of 250 to 500 feet. After the third sign, a series of orange cones will be set up to funnel traffic into one lane so that the drivers arrive at the contact point in a single line of cars. Lighted fusees will be placed between the orange cones for additional illumination of the checkpoint lane. The area where the contact officers are located shall be totally illuminated by portable lighting equipment during evening operations. In addition, contact officers shall use reflectorized vests to increase their visibility. The opposite lane of traffic will not be checked; however, it will be slowed and funneled into one lane as an additional safety measure.

Then-Director Hough testified that an additional criteria not set forth in the

Guidelines is that the site selected must afford the driver the opportunity to make a legal and safe U-turn. Trial Transcript, Vol. I, pp 98-103.

The essential aspects of the checkpoint operation are described in the Guidelines as follows, App. to Pet. for Cert. 161a-163a:

"Officers will be assembled in the roadway to check motorists for articulable signs of intoxication. These officers will wear department-issued reflectorized vests and utilize orange cones attached to their flashlights for traffic direction and control.

"All traffic entering the checkpoint will be stopped. A uniformed police officer will approach the motorist and state, 'I am Trooper (Officer) _____ of the Michigan State Police (local police department). You have entered a sobriety checkpoint set up to identify intoxicated drivers.' If there is no immediate evidence of intoxication, a traffic safety informational brochure and survey card will be given to the motorist.

"During the brief stop, the officer will look for articulable signs of intoxication such as an odor of alcohol about the driver, slurred speech, and other behavior normally associated with OUIL or OUID violators. If the officer observes symptoms of intoxication, the driver will be directed to a predetermined 'safe area' for further investigation. If the situation warrants, the driver will be asked to submit to a preliminary breath test; and if sufficient evidence of intoxication is observed, the driver will be arrested."

The only sobriety checkpoint operation conducted by Petitioner Department of State Police occurred on May 17, 1986, and was operated according to the Guidelines. As described in the testimony of Colonel Hough, Inspector Fladseth and Lieutenant Slaughter (Hearing Transcript, Vol. I, pp 103-108; Vol. III, pp 3-118), it was a successful operation. Despite the fact that it was closed down after less than one hour of operation due

to inclement weather, the checkpoint was able to accommodate 126 vehicles with an average time of delay to the motorists of 30 seconds or less. Six drivers made U-turns and two others turned off to avoid the checkpoint. Acceptance by the people going through the checkpoint was favorable as evidenced by the fact that none of the drivers appeared ill at ease and everyone cooperated with the officers. The checking of these 126 drivers resulted in the detaining of two drivers for sobriety field tests and the arrest of one driver for driving while under the influence of alcohol. Another driver ran through the sobriety checkpoint and was subsequently stopped by the officer in the observation vehicle and arrested for driving while under the influence of alcohol. There were no accidents,

injuries, or altercations reported. This operation resulted in extensive media coverage as expected and encouraged by the law enforcement agencies involved.

Respondents filed a Complaint in the Wayne County Circuit Court on May 16, 1986, alleging that the sobriety checkpoint procedures on their face violated both the United States Constitution and the Michigan Constitution. Respondents sought declaratory judgment and a preliminary injunction against the use of sobriety checkpoints. Petitioners stipulated that no further sobriety checkpoints would be conducted pending the outcome of the litigation.

The trial court held an evidentiary hearing and then issued an opinion and order (App. to Pet. for Cert. 26a)

holding the checkpoint procedure unconstitutional. The Michigan Court of Appeals said that the trial court's findings were not clearly erroneous and affirmed (App. to Pet. for Cert. 2a) and the Michigan Supreme Court denied leave to appeal (App. to Pet. for Cert. 1a). The state courts applied a balancing test pursuant to Brown v Texas, 443 US 47 (1979), and purported to weigh the gravity of the public concerns served by the checkpoints, the degree to which they advanced the public interest, and the severity of their interference with individual liberty. The trial court concluded that there was a grave and legitimate public interest in curbing drunk driving (App. to Pet. for Cert. 72a-74a); that the checkpoints resulted in the apprehension of some drunk drivers

and that the evidence showed a short-term deterrent effect (App. to Pet. for Cert. 79a-83a, 92a); and that objectively the intrusion on individual liberties caused by the checkpoints was minimal and that the procedures minimized on-the-scene discretion (App. to Pet. for Cert. 104a, 113a).

Despite these conclusions, the trial court declared the sobriety checkpoint procedures facially unconstitutional because it found that the procedures would have "only a minimal degree of effectiveness" since there was no showing of long-term deterrent effect and since the State did not "demonstrate that checkpoints are the only practical alternative" to advance its interests. (App. to Pet. for Cert. 123a, 102a, 97a (emphasis in original)).

The trial court also declared the checkpoint procedures facially unconstitutional because it found that the procedures "have the potential for generating significant degrees of surprise and fear in motorists", that they have a "potential for abuse", and they have "a significant potential for intruding on traditionally protected liberty and privacy interests ... ." App. to Pet. for Cert. 118a, 117a.

SUMMARY OF ARGUMENT

Drunk driving is one of the nation's most serious public health and safety issues, resulting in tens of thousands of deaths and injuries each year, as well as hundreds of millions of dollars of economic harm. In an effort to address this serious social problem by apprehending drunk drivers and deterring motorists from drinking and driving, Michigan and many other states have sought to implement automobile checkpoints which require temporary stops of all vehicles. The Michigan sobriety checkpoint program was developed after careful study of programs in other states and of court decisions concerning their validity. Painstaking efforts were made to develop a pilot program which would be based on objective

neutral criteria in order to limit potential abuses of discretion and which would be minimally intrusive while still preserving its effectiveness. Despite these efforts, a Michigan state court declared the program to be facially unconstitutional, in violation of motorists' Fourth Amendment rights.

The fundamental Fourth Amendment principle is that a seizure like that in a traffic checkpoint be "reasonable". This requires balancing the motorists' right to be free from arbitrary interference by law officers against the checkpoint's promotion of legitimate governmental interests. This Court has recognized that different traffic-checking procedures involve different balances of public and private interests

and thus may be subject to different constitutional safeguards. In Almeida-Sanchez v United States, 413 US 266 (1973) and United States v Ortiz, 422 US 891 (1975), the Court held that searches of automobiles, whether by roving police patrols or at checkpoints, must be based on probable cause. In United States v Brignoni-Ponce, 422 US 873 (1975) and Delaware v Prouse, 440 US 648 (1979), the Court held that seizure of automobiles for further inquiry by roving police patrols requires reasonable suspicion based on articulable facts. In United States v Martinez-Fuerte, 428 US 543 (1976), however, the Court held that a vehicle may be stopped for further questioning without any suspicion of wrongdoing at a permanent traffic checkpoint because checkpoint stops are

substantially less intrusive than roving patrol stops. Petitioners submit that the proposed Michigan sobriety checkpoints are constitutionally indistinguishable from the checkpoint in Martinez-Fuerte and are not as intrusive as the roving police patrols in Brignoni-Ponce and Prouse.

The undisputed evidence in this case shows that the social problem of drunk driving is severe; that the Michigan sobriety checkpoints will in fact result in the apprehension of drunk drivers in approximately 1% of the vehicles passing through the checkpoint; that the checkpoints will have a short-term deterrent effect on drunk driving; that the procedures used in the checkpoints minimize on-the-scene discretion by law enforce-

ment officers; and that the checkpoints objectively are only minimally intrusive. Petitioners submit that under the appropriate balancing of public and private interests, the Michigan sobriety checkpoint program is facially constitutional.

The state court's conclusion to the contrary is based upon a distortion of the appropriate balancing test and upon speculation and findings of fact which are not supported by the record. The state court erroneously required Petitioners to prove, in advance and with empirical data, that the checkpoints would generate an unspecified higher arrest rate, that they would have long-term deterrent effect, and that they are the only practical alternative available

to combat the drunk driving problem. The state court also concluded, without any basis in the record, that the checkpoints had a potential for abuse and a potential for generating fear or surprise in some motorists. In this facial constitutional challenge, the state court clearly misapplied the appropriate balancing test and made erroneous factual findings.

Where, as here, the seriousness of the social problem is great, the intrusion is minimal and there is reasonable effectiveness in the law enforcement practice, the Michigan sobriety checkpoint program should be declared facially constitutional.

ARGUMENT

THE MICHIGAN SOBRIETY CHECKPOINT PROGRAM IS CONSTITUTIONAL ON ITS FACE.

General Constitutional Principles.

This is a facial challenge to the constitutionality of the Michigan sobriety checkpoint program. Complaint, ¶¶ 27, 31 (J. App. 8a, 9a). The six named individual plaintiffs had never been subjected to a sobriety checkpoint. They brought this action for injunctive and declaratory relief on the basis of the Guidelines describing the proposed program (App. to Pet. for Cert. 133a-164a) before any sobriety checkpoint had been operated in Michigan. Because this is a facial constitutional challenge, the question is whether the sobriety checkpoints as contemplated in the Guidelines

"can ever be conducted." Skinner v Railway Labor Executives Assn, 489 US __; 103 L Ed 2d 639, 670, fn 10 (1989) (emphasis in original). C.f. Bell v Wolfish, 441 US 520, 560 (1979). If this Court upholds the facial constitutionality of the Michigan checkpoint program, it of course remains true that any individual subjected to a checkpoint is free to challenge the constitutionality of that checkpoint as applied to him or her. See United States v Martinez-Fuerte, 428 US 543, 559 (1976) ("Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." (footnote omitted)).

It is undisputed that the limited stops of automobiles at the Michigan

traffic sobriety checkpoints constitute "seizures" implicating Fourth Amendment rights. United States v Martinez-Fuerte, supra, 428 US at 556. See also Brower v County of Inyo, 489 US ___; 103 L Ed 2d 628, 635 (1989) (a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied" (emphasis in original)). Recognition that the Fourth Amendment applies is merely the first step of the analysis, however, as this Court recently summarized in Skinner v Railway Labor Executives Assn, supra, 103 L Ed 2d at 660-661:

> "To hold that the Fourth Amendment is applicable ... is only to begin the inquiry into the standards governing such intrusions. *** For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. *** What is reasonable, of course, 'depends on

all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' *** Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ***

"In most criminal cases we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. *** We have recognized exceptions to this rule, however, 'when "special needs beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable"' *** When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context."

The opinion in Railway Labor Executives goes on to list several of the contexts in which a different standard was applied, 103 L Ed 2d at 661, and several other cases contain more extensive lists of examples, see, e.g., Texas

v Brown, 460 US 730, 735-736 (1983) (plurality opinion). It would serve no useful purpose to attempt an exhaustive list of such exceptions here, but it should be noted that such cases have been summarized as involving circumstances which make the warrant and probable cause requirement impracticable because of "a special law enforcement need for greater flexibility." In such circumstances, it is appropriate to balance the governmental and private interests to determine whether "the public interest is best served by a lesser standard." New Jersey v T. L. O., 469 US 325, 351 (1985) (Blackmun, J., concurring).

One exception to the Warrant Clause which is "clearly justified", Texas v Brown, supra, 460 US at 745, n 1 (Powell,

J., concurring), is the automobile exception. Automobiles have traditionally been treated differently than homes for Fourth Amendment purposes, because of the inherent mobility of automobiles and because "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." South Dakota v Opperman, 428 US 364, 367 (1976) (footnote omitted). In Opperman, this Court noted that the expectation of privacy with respect to automobiles "is further diminished by the obviously public nature of automobile travel". It also observed that automobiles are subjected to "pervasive and continuing governmental regulation and controls" and that as part of their responsibility for ensuring public safety, law enforcement

officials are frequently brought into circumstances where they stop and examine vehicles "as an everyday occurrence". 428 US at 368.

Fourth Amendment Principles in Traffic-Checking Cases.

"It is settled, of course, that a stop and search of a moving automobile can be made without a warrant." Almeida-Sanchez v United States, supra, 413 US at 269, citing Carroll v United States, 267 US 132 (1925). In Almeida-Sanchez the Court held that roving Border Patrol searches of vehicles require probable cause. In United States v Ortiz, 422 US 891 (1975), the Court followed Almeida-Sanchez and held that even at routine traffic checkpoints where it was permissible to stop all oncoming

vehicles, officers may not search private vehicles without consent or probable cause. 422 US at 896-897. The Court was careful to note, however, that not every aspect of a routine automobile inspection (which might include examination of the trunk, under the hood, beneath the chassis and behind seat cushions) necessarily constitutes a search for purposes of the Fourth Amendment. 422 US at 897, fn 3. The Court also indicated that a different standard might apply if the vehicle inspection was for a purpose other than discovering illegal aliens, 422 US at 897, fn 3:

> "Nor do we suggest that probable cause would be required for all inspections of private motor vehicles. It is quite possible, for example, that different considerations would apply to routine safety inspections required as a condition of road use."

In Almeida-Sanchez and Ortiz, the Court dealt with intrusive searches, but in United States v Brignoni-Ponce, 422 US 873 (1975), the Court dealt with the Fourth Amendment standard to be applied in seizures of automobiles made by roving patrols for the purpose of a brief inquiry in order to question the occupants about their citizenship and immigration status. The Court observed that the reasonableness of such seizures "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." 422 US at 878. The Court recognized the "valid public interest" which "demands effective measures to prevent the illegal entry of aliens", 422 US at 879, 878, and said:

> "Because of the limited nature of the intrusion, stops of this sort may be

> justified on facts that do not amount to the probable cause required for an arrest." 422 US at 880.

The Court enunciated the following standard, 422 US at 884:

> " ... officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion 'that the vehicles contain aliens who may be illegally in the country." (footnote omitted).

The Court also observed that each case must turn on the totality of its own particular circumstances, 422 US at 885, fn 10, and therefore observed that other considerations might apply in other contexts, 422 US at 883, fn 8:

> "Our decision thus does not imply that state and local law enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters."

In Delaware v Prouse, 440 US 648 (1979), the Court dealt with a situation similar to that in Brignoni-Ponce, although not involving the Border Patrol. The question in Prouse was whether police officers could make a totally random stop of an automobile being driven on a public highway for the purpose of checking the driver's license of the operator and the registration of the car, where there was no suspicion of any wrongdoing. The Court recognized the states' "vital interest" in vehicle licensing registration and inspection requirements, but noted that random stops to check documents involved significant "physical and psychological intrusion" upon the motorist and that random, discretionary spot checks were not "a sufficiently productive mechanism to justify the intrusion". 440 US at 658, 657, 659.

Two aspects emerge from the Court's opinion with great clarity. First, the significant nature of the intrusion caused by a random stop--as opposed to a checkpoint--was said to be "crucial." 440 US at 656. Second, the state urged that its police officers be subject to no constraints at all in deciding which cars to stop, and this Court concluded that without either particularized suspicion or "some other substantial and objective standard or rule to govern the exercise of discretion" such seizures posed a "grave danger of abuse of discretion by the official in the field which should be circumscribed." 440 US at 661-662.

Because of the extent of the intrusion and the danger of abuse of discretion, the Court in Prouse adopted a

standard of "articulable and reasonable suspicion" before a roving police patrol was permitted to stop an automobile and detain the driver in order to check his driver's license and automobile registration. 440 US at 663. Again, however, just as in Ortiz, supra, and Brignoni-Ponce, supra, the Court was careful to indicate that its holding was not necessarily applicable in other contexts, 440 US at 663:

> "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.[26] Questioning of all oncoming traffic at road block-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

---

[26]"Nor does our holding today cast doubt on the permissibility of road-

> side truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others."

In Almeida-Sanchez and Ortiz, the Court held that searches of automobiles, whether by roving patrols or at permanent checkpoints, must be justified by probable cause. In Brignoni-Ponce and Prouse, the Court held that seizures of automobiles for brief inquiry by roving patrols requires the lesser standard of articulable facts and reasonable suspicion. Different traffic-checking practices involve different balances of public and private interests and thus may be subject to different and less stringent constitutional safeguards. United States v Martinez-Fuerte, 428 US 543, 555 (1976).

In Martinez-Fuerte the Court dealt with yet another factual context--one which Petitioners submit is constitutionally indistinguishable from the facts of the instant case--and held that at a permanent traffic checkpoint a vehicle may be stopped for brief questioning of its occupants even without any suspicion of wrongdoing. The Court concluded that the purpose of the stops is legitimate and in the public interest; that the need for this enforcement technique had been demonstrated; and that the reasonableness of the procedures used in the checkpoints minimized the intrusion on the interests of motorists and minimized discretionary enforcement activity.

The most important aspect of the checkpoint seizures in Martinez-Fuerte

which distinguished them from the roving patrol seizures in Brignoni-Ponce was the fact that in checkpoint seizures, "the subjective intrusion--the generating of concern or even fright on the part of lawful travelers--is appreciably less" than in roving patrol stops. 428 US at 558. Three terms later, in Delaware v Prouse, supra, 440 US at 656, the Court characterized this distinction as "crucial". Furthermore, the Court in Martinez-Fuerte concluded that because of the "regularized manner" in which the checkpoints were operated, and because of their "public and relatively routine nature", their potential interference with legitimate traffic and their potential room for abusive or harassing stops was minimal. 428 US at 558-560.

Although the Court refrained from an expansive ruling applicable to factual circumstances not before it, it observed that similar types of traffic-checking stops are common, 428 US at 560, fn 14:

> "Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendant's position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use."

Application of Principles to Michigan Sobriety Checkpoint Procedure.

The Michigan sobriety checkpoint program serves the law enforcement goal of apprehending drunk drivers and, in addition, also serves other "special needs" such as promoting highway safety in specific locations having a history of alcohol-related accidents, deterring drunk driving and educating the public by increasing the awareness of the drunk driving problem. In these circumstances there is no doubt that a balancing test is appropriate to determine the Fourth Amendment standard applicable to sobriety checkpoint seizures. In the instant case the state court purported to apply a balancing test as enunciated in Brown v Texas, 443 US 47, 50-51 (1979). Brown is not a traffic-checking case and, indeed,

does not involve automobiles at all. Rather, it involved a state statute making it a crime for a person to refuse to identify himself to a police officer who has lawfully stopped the person. In holding the state statute unconstitutional the Court discussed, inter alia, several of the automobile traffic-checking cases and concluded, 443 US at 50-51:

> "The reasonableness of seizures that are less intrusive than a traditional arrest *** depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *** Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. ***
>
> "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expec-

> tation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. *** To this end, the Fourth Amendment requires that a seizure must be based on specific objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." 443 US at 51.

Neither the state court nor the Respondents appear to dispute that the Guidelines under which the Michigan sobriety checkpoint procedure is to be operated constitute "explicit, neutral limitations on the conduct of individual officers" in effectuating seizures of automobiles. Brown, supra, 443 US at 51. Indeed, the state court concluded that the Guidelines "will ensure that on-the-scene officers' discretion relative to the operation of sobriety checkpoints

will be minimal." App. to Pet. for Cert. 113a. Instead of focusing on the importance of the public concern, the objectively minimal intrusion and the strict limits on discretion, the state court erroneously applied a heightened--but unspecified--test for showing effectiveness and relied upon a wholly theoretical basis--without any support in the record--for finding "potential" constitutional infirmity.

The Gravity of the Public Concern

The gravity of the public concern which is at issue in the instant case is undisputed. This Court has made reference to it in South Dakota v Neville, 459 US 553, 558 (1983), in the course of holding that the admission into evidence of refusal to take a blood-

alcohol test did not violate constitutional rights:

> "The situation underlying this case--that of the drunk driver--occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here."

In Railway Labor Executives Association, supra, 103 L Ed 2d 639, this Court approved a program of breath, urine and blood testing for drugs and alcohol which constituted searches far more intrusive than the limited seizures at issue in this case. Individualized suspicion was not required because the "important government interest furthered by the intrusion" outweighed the "minimal" privacy interest at stake, particularly in an area which is "regulated pervasively to ensure safety." 103 L Ed 2d at 666.

> "This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also 'require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed.'" 103 L Ed 2d at 662. (Citation omitted).

In Railway Labor Executives Association, supra, the testing program was based in large part on the fact that in the eleven-year period from 1972 to 1983 nationwide statistics showed there were at least 21 significant train accidents involving drug or alcohol use which resulted in 25 fatalities, 61 non-fatal injuries and property damage of $19 million, 103 L Ed 2d at 653. In the instant case, by comparison, the advisory committee which developed the Guidelines for the Michigan sobriety checkpoint

program cited the following statistics, App. to Pet. for Cert. 140a:

> "Michigan 1984 alcohol-related traffic crash statistics reveal that 800 persons died, 28,681 suffered personal injury, with a total economic cost of $351,959,000."

Degree To Which Seizure Advances Public Interest

Undisputed evidence in the instant case demonstrated that the Michigan sobriety checkpoints did in fact result in apprehending drunk drivers (2 arrests out of 127 vehicles) and that such checkpoints have short-term deterrent effect. Respondents' expert witness Dr. H. Laurence Ross claimed to be familiar with every major published study involving governmental efforts to control drunk driving (J. App. 41a), and although he knew of no conclusive studies

demonstrating long-term deterrent effects of sobriety checkpoints (J. App. 56a), his own scholarly writings indicated that the evidence regarding such checkpoints is encouraging and that the potential for this enforcement technique should be considered a high priority matter for policy analysis (J. App. 67a, 69a). More importantly, Dr. Ross testified that sobriety checkpoints do in fact have short-term deterrent effect (J. App. 64a-65a):

> "Q. Would it be true, sobriety check lanes or checkpoints for the short time have shown to have some positive effect as far as deterrent?
>
> "A. That is correct.
>
> " ***
>
> "Q. I see. You do say there is evidence of a deterrent effect on the short-term than as to lives saved?
>
> "Yes."

The state court acknowledged that the evidence showed "a minimal degree of

effectiveness", but declared the sobriety checkpoint program facially unconstitutional because it would not result in enough arrests, because no long-term deterrent effect had been proven, and because other law enforcement procedures were available. App. to Pet. for Cert. 123a. Petitioners submit that this conclusion is clearly erroneous on the basis of the record and is incorrect as a matter of law since it distorts the appropriate test for evaluating the reasonableness of the procedure.

As shown by the single checkpoint procedure which was implemented in Michigan (2 arrests out of 127 vehicles), as well as by the statistics in other reported cases, traffic sobriety checkpoints result in the apprehension of per-

sons charged with drunk driving in approximately 1% of the vehicles which go through the checkpoints. App. to Pet. for Cert. 79a-83a. The state court found that this was not effective enough (Id., 83a), but the 1% success rate compares very favorably with the success rates in other search and seizure contexts which have been found constitutional.

For example, in National Treasury Employees Union v VonRaab, 489 US ____, 103 L Ed 2d 685 (1989), it was contended, among other things, that a drug testing program was unjustified and therefore unreasonable because no more than five employees out of 3,600 tested positive for drugs. The Court evaluated this contention in light of the safety and security hazards which the program

addressed and categorically rejected the challenge, 103 L Ed 2d at 708:

> "The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, see Camara v Municipal Court, 382 US 523 (1967), and of motorists who are stopped at the checkpoints we approved in United States v Martinez-Fuerte, 428 US 543 (1976). *** Where, as here, the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal." (Footnote omitted).

In the footnote to the foregoing quotation, the Court analogized to the required search of all passengers seeking to board commercial airliners as well as the search of their carry-on luggage and observed, 103 L Ed 2d at 708, fn 3:

> "When the government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success."

In National Treasury Employees Union, supra, the positive drug testing rate was slightly more than one-tenth of one per cent. That is virtually the same as the percentage of vehicles found to contain deportable aliens at the checkpoint in Martinez-Fuerte, 428 US at 554 (171 out of 146,000 vehicles). The airport searches discussed in footnote 3 of National Treasury Employees Union found 42,000 firearms out of approximately 19.5 billion searches of persons and pieces of luggage for a success rate of approximately 0.0002%. Those statistics should be compared to the success rate of sobriety checkpoints which approximates 1%.

The success rate of apprehending drunk drivers must also be evaluated in light of the fact that the features of the program which reduce its effectiveness--such as advance publicity, limited hours of operation, and the opportunity to avoid the checkpoint entirely--are the same factors which reduce the intrusiveness of the seizure itself. The irony of this was noted in National Treasury Employees Union v VonRaab, supra, 103 L Ed 2d at 709, n 4.

Despite the undisputed evidence of the short-term deterrent effect of sobriety checkpoints (J. App. 64a-65a), the state court decision seems to be based on a unilateral-post-trial requirement that the State prove long-term deterrent effect. Petitioners submit

that such a requirement is without support in either logic or Fourth Amendment jurisprudence. The facial constitutionality of innovative law enforcement techniques does not depend upon an advance empirical demonstration of long-term deterrent effect. The state court's decision to the contrary is simply wrong.

The state court also incorrectly required Petitioners to demonstrate, by empirical proof, "that checkpoints are the only practical alternative." App. to Pet. for Cert. 97a, (footnote omitted, emphasis in original). To the extent that the state court evaluated the effectiveness of the sobriety checkpoint procedure in comparison to other police procedures, its decision clearly violates the principle that such less-restrictive-

alternative arguments are inapplicable in the search and seizure context. In United States v Martinez-Fuerte, 428 US at 556, fn 12, the Court specifically rejected such an argument:

> "The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure powers."

The inapplicability of this type of analysis was recently reaffirmed in Railway Labor Executives Association, supra, 103 L Ed 2d at 667, n 9, where the Court again rejected such an argument:

> "We have repeatedly stated, however, that '[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.' *** It is obvious that '[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers,' ... because judges engaged in post hoc

> evaluations of government conduct 'can almost always imagine some alternative means by which the objectives of the [Government] might have been accomplished.'"
> (Citations omitted).

It is undisputed that in order to be constitutional a law enforcement procedure must have some degree of effectiveness in advancing the public interest. For example, in Delaware v Prouse, supra, 440 US at 659, the Court concluded that the random roving patrol seizure was not "a sufficiently productive mechanism to justify the intrusion". Furthermore, depending upon the "totality of the particular circumstances", Brignoni-Ponce, 422 US at 885, fn 10, it may be appropriate, in evaluating effectiveness, to consider "practical alternatives". Brignoni-Ponce, 442 US at 881. The error in the decision of the

state court in the instant case, however, is that it imposed on the Petitioners the burden of proving--in advance and by empirical data--that sobriety checkpoints meet some unspecified level of long-term effectiveness and that such checkpoints will be the most effective of all possible alternative police procedures. In placing such an impossible burden on the state, the state court seems to have forgotten that the test enunciated in this Court's decisions is a balancing test. The relative strength or weakness of any one of the factors identified in Brown, supra, 443 US at 51, is not dispositive. The fundamental standard is "reasonableness" and "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment

interests against its promotion of legitimate governmental interests." Delaware v Prouse, supra, 440 US at 654.

This Court's decisions appear to apply a standard of "reasonableness" in evaluating the effectiveness of particular law enforcement practices. For example, in Prouse, supra, 440 US at 660, the Court invalidated the practice of random spot checks because they did not appear "sufficiently productive to qualify as a reasonable law enforcement practice ... ." In New York v Burger, 482 US 691, 709-710 (1987), the Court upheld warrantless searches of a pervasively regulated business, in part because frequent unannounced searches were necessary in order to be effective and serve as a credible deterrent. Given

the nature of the problem of automobile theft, the Court said that the state "rationally may believe" that warrantless searches will address the problem and that such a procedure "reasonably serves the State's substantial interest". Even if it is not possible to specify with precision the exact constitutional threshold of effectiveness a law enforcement procedure must meet or the exact relationship it must bear to other possible procedures, where, as here, the nature of the public interest is very substantial and the intrusiveness is minimal, the facial constitutionality of sobriety checkpoint seizures should be upheld without requiring the advance empirical showing of the heightened level of effectiveness mandated by the state court.

Regardless of what level of effectiveness is constitutionally required, Petitioners submit that the evidence in the instant case is sufficient to meet it. There is undisputed evidence of short-term deterrent effect and of a success rate of more than 1% in apprehending drunk drivers at sobriety checkpoints. This level of effectiveness is greater than that in Martinez-Fuerte, supra, 428 US 543.

In Martinez-Fuerte, this Court concluded that seizures at checkpoints for the purpose of brief inquiry are permissible even without any individualized suspicion. The Court concluded that "the need for this enforcement technique", 428 US at 562, was demonstrated in three respects: The government identified it

as an important practice; there was factual evidence indicating an apprehension rate of approximately 0.1%; and the Court found, without citation to any evidence in the record, that there was a deterrent effect inherent in the procedure. 428 US at 556-557. In the instant case the undisputed factual record shows that appropriate officials believe that sobriety checkpoints have the potential for significantly reducing the number of drunk drivers on the road, thus reducing the fatality rate, the injury rate, and the significant property damage caused by drinking and driving. Undisputed evidence further shows that in the one checkpoint which was in fact operated in Michigan for less than one hour, two drivers were apprehended for driving under the influence of alcohol. The effective

rate of apprehension for that limited operation is approximately ten times the rate which the Court identified in Martinez-Fuerte as resulting in a "high" number of apprehensions, 428 US at 562, fn 15, and as resulting in the apprehension of "many" violators. 428 US at 557. Undisputed testimony from Respondents' own expert witness demonstrated short-term deterrent effectiveness from the operation of sobriety checkpoints, although in his opinion it was unlikely that there would be long-term deterrent effects.

On this record, the showing of the "degree to which the seizure advances the public interest", Brown, supra, 443 US 51, is significantly greater than the showing in Martinez-Fuerte. This showing

must be evaluated in light of the fact that this is a facial constitutional challenge in which the question is "whether the tests contemplated by the regulations can ever be conducted". Railway Labor Executives Assn, supra, 103 L Ed 2d at 670, fn 10. C.f., Bell v Wolfish, 441 US 520, 560 (1979).

The Michigan court's conclusion that the sobriety checkpoint program fails the so-called "effectiveness" test is incorrect as a matter of law and is contrary to the factual record.

The Checkpoints Are Only Minimally Intrusive

The state court correctly concluded that the sobriety checkpoint procedures will result in only minimal objective intrusion and that the Guidelines ensure

that the discretion of officers on the scene is minimal. App. to Pet. for Cert. 104a, 113a. These conclusions are inescapable, given the undisputed nature of the procedure as described in the Guidelines contained in App. to Pet. for Cert. 133a-164a. The state court went on, however, to say that there was a potential that some motorists would experience fear or surprise and there was a potential for intruding on a traditionally protected liberty interest and therefore the state court held that the checkpoint procedure is facially unconstitutional. Petitioners submit that this conclusion is without factual support in the record, distorts the appropriate constitutional balancing test and is directly contrary to decisions of this Court stating that checkpoint stops,

like the stops contemplated by the Michigan procedure, are not subjectively intrusive.

This Court has had several occasions to evaluate the intrusiveness of various types of traffic stops. In United States v Ortiz, 422 US 891, 894-895 (1975), the Court observed that seizures at traffic checkpoints are "far less intrusive" than those at roving patrol stops:

> "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officer's authority, and he is much less likely to be frightened or annoyed by the intrusion."

Similarly in United States v Martinez-Fuerte, supra, 428 US at 558-559, the Court reiterated that the subjective intrusion at checkpoint stops is "appreciably less" than the intrusion caused by roving patrols:

> "Routine checkpoint stops do not intrude similarly upon the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." (Footnote omitted).

See also Delaware v Prouse, supra, 440 US at 657.

The state court said that because the Michigan sobriety checkpoints are movable from day to day, unlike the permanent fixed checkpoint in Martinez-Fuerte, the sobriety checkpoints had the potential to generate fear or surprise in some motorists. There is no evidence to support such a conclusion. There was no testimony to that effect from any of the individual Respondents or any other witness, and there is simply no factual basis for inferring such a subjective reaction. Furthermore, the factual differences between the Michigan sobriety checkpoints and the checkpoints in Martinez-Fuerte are not significant enough to justify different constitutional treatment.

The Court's opinions in both Ortiz, supra, 422 US at 893-894 and in

Martinez-Fuerte, supra, 428 US at 545-547, 554, describe the operation of the checkpoint. Although the checkpoint is not in operation approximately 30% of the time, Martinez-Fuerte, supra, 428 US at 554, when it is in operation, it functions in a manner which is virtually indistinguishable from the Michigan sobriety checkpoint procedures described in the Statement of Facts, supra, pp 6-11. The only difference between the sobriety checkpoints at issue in the instant case and the checkpoints at issue in Martinez-Fuerte is that Michigan's sobriety checkpoints are not operated at permanent locations and their exact locations are not publicized in advance. Unlike a roving patrol, however, while a sobriety checkpoint is in operation, its location is fixed, the duration of its

operation is limited to a few hours, the duration of each seizure is limited to a few seconds, and the potential for arbitrary exercise of discretion is minimized. The existence of checkpoints in a general area is publicized in advance and each checkpoint is operated in such a manner, by way of advance signs, lights, and fusees, for example, that its location cannot be deemed a surprise to a motorist. In sum, the operation of the Michigan sobriety checkpoints is, for constitutional purposes, identical to the checkpoints at issue in Martinez-Fuerte and is unlike the roving patrols at issue in Prouse.

In evaluating the subjective intrusion of the sobriety checkpoint procedure, the state court imposed an

additional factor and purported to evaluate the extent to which the proposed checkpoints are consistent with traditionally protected liberty and privacy interests. Using its own subjective perceptions of the implications of such a procedure, the court found a "potential for abuse" and declared that the proposed sobriety checkpoint program is "not consistent" with such interests. App. to Pet. for Cert. 113a-117a. This type of analysis is very similar to the less-restrictive-alternative approach which this Court has rejected in the search and seizure context, Railway Labor Executives Assn, supra, 103 L Ed 2d at 667, n 9, and is inconsistent with the test which this Court has consistently applied which requires "balancing its intrusion on the individual's Fourth Amendment interests

against its promotion of legitimate governmental interests", Prouse, supra, 440 US at 654. The state court declared the sobriety checkpoint program facially unconstitutional in part because it "goes beyond the traditionally recognized reasons for stopping motorists in their cars." App. to Pet. for Cert. 115a. This is an inadequate and improper basis for rendering a judgment of facial unconstitutionality.

CONCLUSION AND RELIEF SOUGHT

It is undisputed that the proposed Michigan sobriety checkpoint program addresses an extraordinarily grave public concern. It is undisputed that the program will be effective, both in apprehending drunk drivers and in having a short-term deterrent effect. It is undisputed that the procedures will minimize on-the-scene discretion by law enforcement officers and that the intrusion on Fourth Amendment interests of motorists will be objectively minimal. On these facts, the proposed program is not unconstitutional on its face, even assuming that there was no proof in advance of long-term deterrent effect and that some motorists might experience fear or surprise at the procedure.

The judgment of the Michigan courts should be reversed and this Court should declare the Michigan sobriety checkpoint program constitutional on its face.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record

Patrick J. O'Brien
Assistant Attorney General

Thomas L. Casey
Assistant Solicitor General
753 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

FILED
DEC 28
JOSEPH F. SPANIOL, JR.
CLERK

...of the United States

...October Term, 1989

...DEPARTMENT OF STATE POLICE and
...C. DAVIS, Director of the
...Department of State Police,

Petitioners,

...JOSEPH R. YOUNG, SR., DOMINIC J.
...CECIL ALLEN, KEITH MUXLOW and
...JACK WELBORN,

Respondents.

...Writ Of Certiorari To The
...Michigan Court Of Appeals

...FOR RESPONDENTS

...Counsel of Record
...Thomas L. Gordon
...Barbara C. Gaal
...American Civil Liberties Union
...Fund of Michigan
...Kennedy Square, Suite 1616
...Michigan 48226

...Liberties Union

...48226

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Michigan Department of State Police sobriety roadblock program is unconstitutional under the Fourth Amendment of the United States Constitution.

TABLE OF CONTENTS

Page

Question Presented i

Table Of Authorities iv

Statement Of The Case 1

Summary Of Argument 7

Argument 9

I. The Michigan sobriety roadblock program, which involves the suspicionless seizure of individuals solely for the purpose of enforcing the criminal law, violates the Fourth Amendment 9

II. Under the record established in this case the Michigan sobriety roadblock program violates the Fourth Amendment balancing test 14

A. The scope of the Court's review of the "facts" presented in the briefs *amicus curiae* 15

B. The non-record "facts" presented by *amici curiae* 21

C. The constitutional balancing test 24

1. Gravity of the public concern 24

2. The degree to which the seizures advance the public interest 24

3. The severity of the interference with individual liberty 31

D. Application of the balancing test to the record 37

Conclusion 44

TABLE OF AUTHORITIES

Page

CASES:

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 37

Brower v. County of Inyo, ___ U.S. ___; 109 S.Ct. 1378 (1989) 9

Brown v. Texas, 443 U.S. 47 (1979) 8, 15, 31, 43

California v. Green, 399 U.S. 149 (1970) 18

Camara v. Municiple Court, 387 U.S. 523 (1967) 42

Davis v. Alaska, 415 U.S. 308 (1974) 18

Delaware v. Prouse, 440 U.S. 648 (1979) ..... *passim*

Donovan v. Dewey, 452 U.S. 594 (1981) 42

Illinois v. Lafayette, 462 U.S. 640 (1983) 41

Katz v. United States, 389 U.S. 347 (1967) 40

Kolender v. Lawson, 461 U.S. 352 (1983) 40

Lockhart v. McCree, 476 U.S. 162 (1986) 20

Mueller v. Oregon, 208 U.S. 412 (1908) 17

National Treasury Employees Union v. Von Raab, ___ U.S. ___; 109 S.Ct. 1384 (1989) 8, 10, 11, 14

New Jersey v. T.L.O., 469 U.S. 325 (1985) 42

New York v. Burger, 482 U.S. 691 (1987) 13

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 32

Sitz v. Department of State Police, 179 Mich. App. 433; 429 N.W.2d 180 (1988) 30

TABLE OF AUTHORITIES – Continued

Page

Skinner v. Railway Labor Executives' Association, ___ U.S. ___; 109 S.Ct. 1402 (1989) ..... *passim*

State v. Smith, 674 P.2d 562 (Ok. Crim. App. 1984) 36

Texas v. Brown, 460 U.S. 730 (1983) 32

United States v. Biswell, 406 U.S. 311 (1972) 42

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 32, 40

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) *passim*

United States v. Villamonte-Marquez, 462 U.S. 579 (1983) 42

CONSTITUTIONS, STATUTES AND REGULATIONS:

U.S. Const. Amend. IV 10, 12, 19, 40, 42

Michigan Const. art. I, §11 1

MCL 257.683(5) 14

MCL 257.715(b) 14

MISCELLANEOUS:

Amsterdam, *Perspectives On The Fourth Amendment*, 58 Minn. L. Rev. 349 (1974) 40

Department of Transportation HS 806 989, *Evaluation of Charlottesville Checkpoint Operations* 23, 27, 35

Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U. Cal. Davis L. Rev. 595 (1985) 14, 35, 41, 42

TABLE OF AUTHORITIES – Continued

Page

LaFave, *Being Frank About The Fourth: On Allen's "Process of 'Factualization' In The Search And Seizure Cases."* 85 Mich L. Rev. 427 (1986) 14

Miller and Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry,* 61 Va. L. Rev. 1187 (1988) 17

National Highway Traffic Safety Association, 3 *Traffic Safety Evaluation Research Review* 5, Nov.-Dec. 1984 22

National Transportation Safety Board, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocation,* NTSB/SS-84/01, Washington D.C. (1984) 21, 23, 35

Strossen, *The Fourth Amendment In The Balance,* 63 N.Y.U. L. Rev. 1173 (1988) 32

Williams & Lund, *Deterrent Effects of Roadblocks on Drinking and Driving,* 3 Traffic Safety Evaluation Res. Review 7 (1984) 21

STATEMENT OF THE CASE

This action was filed in May 1986 on behalf of six members of the Michigan Legislature (hereinafter: "Plaintiffs"), seeking declaratory and injunctive relief prohibiting the Michigan Department of State Police and the Director of that Department (hereinafter: "Defendants") from instituting a program of sobriety roadblocks. Plaintiffs alleged that the roadblocks violated rights secured by both the Fourth Amendment of the United States Constitution and Article I, § 11 of the Michigan Constitution.

Hearings were conducted on Plaintiffs' Motion for Preliminary Injunction in May and June 1986 before the Honorable Michael L. Stacey of the Wayne County Circuit Court. During the course of these hearings, the parties stipulated that the trial court's decision on the Motion for Preliminary Injunction would also serve as the determination of Plaintiffs' additional request for permanent injunctive relief.

At the hearing, Plaintiffs demonstrated three general points: the manner in which the roadblocks would operate, how such roadblocks infringed on the privacy interests of the driving public, and, most importantly, that such roadblocks are not an effective means of addressing the drunk driving problem.

One of Plaintiffs' witnesses was Dr. Lawrence Ross, a professor of sociology at the University of New Mexico, and one of the nation's preeminent authorities on the subject of deterring the drinking driver. Dr. Ross testified that *any* law enforcement technique could have a short term favorable impact on drunk driving statistics if it

creates a public perception that detection and punishment of the drinking driver is somehow enhanced (App. 45a-46a, 72a). However, according to Dr. Ross's analysis of all studies on this subject, the deterrent effect of any drunk driving program diminishes rapidly if and when the driving public realizes that the prospects of detection and arrest as a result of the technique are not great (App. 53a-54a). This phenomenon of rapidly dissipating deterrent impact was described by Dr. Ross as a learning curve: in the short-term the public may alter its driving behavior in the face of a novel police practice, but, when the public recognizes that the program does not increase the certainty of punishment, it no longer influences behavior (App. 54a).

Dr. Ross also testified that the "learning curve" phenomenon would apply to sobriety roadblocks. To be effective for even a limited period of time, sobriety roadblocks must be widely publicized and instill in the public the perception that this police practice increases the possibility of detecting drunk drivers (App. 58a). However, Dr. Ross further testified that, as a tool for arresting drunk drivers, sobriety roadblocks are worthless (App. 55a-56a).

According to Dr. Ross, data taken from the studies of sobriety roadblocks indicate that less than one percent of all drivers who pass through such roadblocks are arrested for drunk driving, and no study ever conducted has indicated a high sobriety roadblock arrest rate (App. 55a-56a). Therefore, Dr. Ross concluded that once the driving public grasps the limited arrest threat posed by these roadblocks, whatever short term deterrent effect they might possess would dissipate (App. 58a-59a, 73a).

Consistent with this conclusion, Dr. Ross noted that no study of sobriety roadblocks has demonstrated a long term deterrent effect on drunk driving (App. 56a).

Dr. Ross's conclusion that sobriety roadblocks are not effective in fighting drunk driving was reiterated by three other witnesses called by Plaintiffs, each of whom was a county sheriff in Michigan.

Macomb County Sheriff William Hackel testified that his county has implemented a number of programs which have succeeded in removing drunk drivers from the roads. Based on his 23 years of experience in law enforcement, Sheriff Hackel concluded that these alternative programs would be more efficient and effective in arresting and deterring drunk drivers than sobriety roadblocks (App. 86a-88a). Sheriff Hackel further testified that the Michigan Sheriffs' Association, of which he was President, voted to formally oppose the use of sobriety roadblocks in Michigan because of their ineffectiveness (App. 94a).

Sheriff Hackel's expert opinions on the inefficiency of sobriety roadblocks were shared by Kalamazoo County Sheriff Thomas Edmonds and Wayne County Sheriff Robert Ficano. Sheriff Edmonds testified that traditional road patrols, in which officers stop drivers for alcohol related offenses based on observed driving behavior, are more effective than roadblocks in combating drunk driving (App. 101a). He also testified that the ineffectiveness of roadblocks, as compared to roving patrols, would be even more pronounced in the rural areas of his county (App. 103a).

Sheriff Ficano also emphasized that roving patrols, which stop vehicles based on an individualized suspicion, would more efficiently address the drunk driving problem than roadblocks (App. 113a). For this reason, Wayne County has refused to participate in the State Police roadblock program, and has no plans to adopt such a program (App. 114a).

The testimony of Sheriffs Hackel, Edmonds and Ficano reflected a single overriding concern. As county sheriffs, their jobs consist of providing citizens with the most effective method of fighting crime consistent with economic constraints. All three agreed that roving patrols would constitute a more effective use of limited law enforcement resources than committing 12 or more officers to a single location to conduct a roadblock at which the statistical likelihood of achieving arrests is minimal.

Plaintiffs also called as a witness the then director of the Michigan State Police, Colonel Gerald Hough. Colonel Hough testified that between eight and 12 officers would operate each roadblock under the guidelines which his department adopted (App. 76a). These officers would be both State Police troopers and members of local law enforcement departments. Colonel Hough conceded that local officers working at sobriety roadblocks might have to be removed from other patrol responsibilities (App. 82a).

Colonel Hough acknowledged that sobriety roadblocks in other states have not produced large numbers of arrests (App. 77a). He conceded that Michigan's sobriety roadblock program was not designed to obtain significant drunk driving arrests, nor could it be justified on the

basis of the limited number of arrests it might ultimately achieve (App. 77a). Colonel Hough maintained, instead, that the roadblock program was designed to deter drunk drivers (App. 77a). However, he further acknowledged that he had no empirical evidence to justify the hope that sobriety roadblocks might deter drunk driving (App. 78a-79a).

Following the presentation of Plaintiffs' case, Defendants called several witnesses, including Lieutenant Raymond Cotton of the Maryland State Police. The Michigan roadblock program has been patterned after Maryland's model (App. 79a). Lieutenant Cotton testified that the only empirical evidence concerning the potential deterrent effect of a sobriety roadblock had to be derived from a three month pilot study conducted in two Maryland counties from December 1982 through February 1983. For that study, Maryland authorities selected two demographically similar counties. In one of these counties sobriety roadblocks were instituted; in the other (the control county), no roadblocks were employed. Following the end of the three month study, the driving statistics in these two counties were analyzed in two respects. The two counties' incidence of alcohol related accidents and alcohol related fatalities during the three month pilot program were compared with their respective statistics for, first, the same three month period one year before, and second, the immediately preceding three month period, September through November 1982.

With respect to the first comparisons, the Maryland statistics indicated that while alcohol related accidents in the county where roadblocks were imposed decreased by 10%, the incidence of such accidents in the control county

was reduced by 11%. In addition, the county in which roadblocks were implemented saw its number of fatal alcohol related accidents more than double, from three in the year before the pilot program to eight during the period of the study. Meanwhile, the control county's fatal accident statistics fell from 16 the previous year to three during the pilot program (App. to Brief In Opp. to Pet. For Cert. 1a).

The comparison between the three months during which the pilot program was instituted and the preceding three months were equally unsupportive of any claimed deterrent effect of sobriety roadblocks. Alcohol related accidents in the county where roadblocks were used fell 16% from the previous three months. However, in the control county, alcohol related accidents fell by 12%. Similarly, the number of fatal accidents in the target county fell by 27%, while it fell 25% in the county where no roadblocks were conducted (App. to Brief in Opp. to Pet. for Cert. 1a).

Ultimately, Lieutenant Cotton was forced to concede that the Maryland pilot study did not establish that sobriety roadblocks acted as a deterrent against drunk driving (App. 119a; Tr. Vol. II, p. 87).

Another of Defendants' witnesses was Lieutenant William Slaughter of the Michigan State Police, who testified concerning the factors which an officer at a roadblock could consider in determining whether an individual who was initially stopped at a sobriety roadblock would be detained for further investigation. These factors could include an odor of alcohol, the driver's manner of speaking, whether the driver's eyes were

bloodshot, whether his or her face was flushed, the general appearance of the driver's clothing, and whether the driver's shirt was unbuttoned (App. 124a-125a). Lieutenant Slaughter further acknowledged that an officer stopping a vehicle at a sobriety roadblock could detain the driver for any one of these reasons or, indeed, for no reason whatsoever (App. 127a).

On July 24, 1986, the trial court issued a comprehensive opinion holding that the Michigan State Police sobriety roadblock program violated rights guaranteed by both the United States and Michigan Constitutions (App. to Pet. for Cert. 26a).

Defendants appealed the trial court's judgment to the Michigan Court of Appeals. In a unanimous opinion dated August 1, 1988, the Court of Appeals affirmed the trial court's determination that the roadblocks constituted an unconstitutional seizure under both the United States and Michigan Constitutions.

On February 22, 1989, the Michigan Supreme Court denied Defendants' Application for Leave to Appeal. Defendants then filed a Petition for Writ of Certiorari which this Court granted on October 2, 1989.

SUMMARY OF ARGUMENT

The sobriety roadblock program proposed by the Michigan State Police violates the Fourth Amendment prohibition against unreasonable searches and seizures.

Sobriety roadblocks involve a seizure for Fourth Amendment purposes. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The seizure of a car and its occupants at a

sobriety roadblock is not based upon any suspicion that the occupants are involved in criminal activity. Moreover, these suspicionless seizures are performed for the sole purpose of enforcing criminal laws prohibiting drunk driving.

A suspicionless seizure which serves only to enforce the criminal law violates the Fourth Amendment. *National Treasury Employees Union v. Von Raab*, ___ U.S. ___; 109 S.Ct. 1384, 1390 (1989); *Skinner v. Railway Labor Executives' Association*, ___ U.S. ___; 109 S.Ct. 1402, 1414 (1989). In these two recent cases, the Court recognized that some measure of individualized suspicion is required for any search or seizure, except where it "serves special governmental needs, beyond the normal need for law enforcement . . . " *Von Raab*, 109 S.Ct. at 1390.

The seizures which take place at a sobriety roadblock serve only the need for the enforcement of the laws related to drunk driving. Consequently, these seizures violate the Fourth Amendment.

Von Raab demonstrates that the suspicionless law enforcement seizures at issue in this case are *per se* unlawful, without reference to a constitutional balancing test. Nevertheless, even if this Court were to apply such a balancing test, *see Brown v. Texas*, 443 U.S. 47, 50-51 (1979), sobriety roadblocks must still be found unconstitutional.

Overwhelming evidence submitted at the trial in this case demonstrated that sobriety roadblocks do not effectively counter the serious problem of drunk driving. The record demonstrated without contradiction that sobriety roadblocks are worthless as a method of effectuating

drunk driving arrests. Indeed, Defendants conceded this point at trial, acknowledging that their program was not even designed to achieve significant numbers of arrests. Defendants maintained, instead, that their program could be justified by deterring drunk driving. However, the evidence presented at trial showed, again without contradiction, that roadblocks are not effective in deterring drunk driving, precisely because they do not lead to significant numbers of arrests.

Sobriety roadblocks, therefore, would involve suspicionless intrusions into the lives of countless innocent people without achieving any positive social benefit. Under the Court's Fourth Amendment balancing test, sobriety roadblocks are therefore unreasonable and, hence, unconstitutional.

ARGUMENT

I. THE MICHIGAN SOBRIETY ROADBLOCK PROGRAM, WHICH INVOLVES THE SUSPICIONLESS SEIZURE OF INDIVIDUALS SOLELY FOR THE PURPOSE OF ENFORCING THE CRIMINAL LAW, VIOLATES THE FOURTH AMENDMENT.

The stopping of vehicles and their occupants under Michigan's sobriety roadblock program constitutes "seizures" within the meaning of the Fourth Amendment. *Brower v. County of Inyo*, ___ U.S. ___; 109 S.Ct. 1378, 1382 (1989); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The question presented to this Court is whether such seizures comply with the dictates of the Fourth Amendment.

The Fourth Amendment prohibits searches and seizures which are unreasonable. This reasonableness standard usually requires that "the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." *Delaware v. Prouse*, 440 U.S. at 654. However, this Court has held that, in some circumstances, the objective standard of probable cause or reasonable suspicion may give way to a balancing test. *National Treasury Employees Union v. Von Raab*, ___ U.S. ___; 109 S.Ct. 1384, 1390 (1989); *Skinner v. Railway Labor Executives' Association*, ___ U.S. ___; 109 S.Ct. 1402, 1414 (1989).

In *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1390, the Court examined those circumstances in which reference to probable cause or some level of suspicion is not required, and the constitutionality of a particular intrusion is to be judged under a balancing test:

> While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, our decision in *Railway Labor Executives* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. As we note in *Railway Labor Executives*, our cases establish that *where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests* to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

Von Raab, 109 S.Ct. at 1390 (citations omitted) (emphasis added); *see also Skinner v. Railway Labor Executive's Association*, 109 S.Ct. at 1414.

In *Von Raab*, this Court was considering the constitutionality of a drug testing program instituted by the United States Customs Service. The Court found that the Customs Service's program was "not designed to serve the ordinary needs of law enforcement," 109 S.Ct. at 1390, and therefore applied a balancing test.

In contrast to the intrusions considered in *Von Raab*, the seizure of motorists under the Michigan State Police sobriety roadblock program is designed to serve only one purpose – the enforcement of criminal laws regarding drunk driving. Such roadblocks are instituted to detect and arrest intoxicated drivers. Quite clearly, these roadblocks serve no special need, "beyond the normal need for law enforcement."

To be sure, the Department of State Police designed its sobriety roadblock program to achieve a broader and laudatory public good – to deter drunk driving and thereby reduce alcohol related traffic accidents. But this broader goal in no way constitutes a special governmental need, beyond the normal need for law enforcement. Accepting such a characterization would render totally meaningless the critical distinction drawn in *Von Raab* and *Skinner*. Since every rational criminal law has as its underlying purpose the deterrence or promotion of a particular form of conduct, a suspicionless search or seizure to enforce the criminal law could always be justified on the basis of its underlying purposes.

The uniquely criminal nature of the seizures involved in a sobriety roadblock is aptly demonstrated by a comparison of Defendants' proposed program with that upheld in *Skinner*. In *Skinner*, the Court considered the constitutionality of regulations promulgated by the Federal Railroad Administration (FRA) which authorized toxicological testing of railway employees under certain circumstances. *Skinner* is, therefore, factually comparable to this case in one important respect. Like the sobriety roadblocks designed by the Michigan State Police, the personal intrusions at issue in *Skinner* were assertedly justified on the basis of "the safety of the traveling public," 109 S.Ct. at 1415, and on the basis of the deterrent effect that such searches would have on the individuals being searched. 109 S.Ct. at 1420. However, before applying a Fourth Amendment balancing test, the Court noted in *Skinner*:

> The FRA has prescribed toxicological tests, not to assist in the prosecution of employees but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'

109 S.Ct. at 1415.[1]

---

[1] In a footnote accompanying the quoted text, the *Skinner* Court addressed briefly the allegation that the testing involved in that case could have been employed as a pretext "to enable law enforcement authorities to gather evidence of penal law violations." 109 S.Ct. at 1415, fn. 5. The *Skinner* Court left open the possibility that an administrative scheme such as that involved in *Skinner* could be invalidated on the basis that it was being used as a "pretext" to obtain evidence of criminal

(Continued on following page)

Directly contrary to the situation presented in *Skinner*, the sobriety roadblocks proposed by the Michigan State Police are designed for the express purpose of assisting in the prosecution of drivers who are driving while intoxicated.

The Court's unwillingness to permit suspicionless searches for law enforcement purposes is also reflected in its decision in *New York v. Burger*, 482 U.S. 691 (1987). In that case, the court upheld a suspicionless search of an automobile junkyard. One of the bases for the constitutional challenge presented in *Burger* was that the administrative scheme involved therein was designed only for the purpose of enforcing the criminal law. 482 U.S. at 712-716.

The Court ultimately rejected this challenge, but, in doing so, it was careful to point out that the searches involved therein sought to address a major social problem through both an administrative scheme and penal sanctions. 482 U.S. at 712. In contrast to the dual purpose searches upheld in *Burger*, the seizures which occur at a sobriety roadblock are designed to address a major social problem solely through penal sanctions. Under this

---

(Continued from previous page)

acts. The Defendants' highly publicized intent to institute sobriety roadblocks to arrest drunk drivers hardly qualifies this program as "pretextual" in nature. But, what an administrative scheme may not accomplish on a "pretextual" basis – enabling law enforcement authorities to gather evidence of penal law violations – *a fortiori* should not be allowed to occur openly and with considerable fanfare.

Court's precedents, these seizures are therefore in violation of the Fourth Amendment. *See* LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' In The Search And Seizure Cases,"* 85 Mich L. Rev. 427 449 (1986); Jacobs and Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U. Cal. Davis L. Rev. 595, 609-610 (1985).[2]

II. UNDER THE RECORD ESTABLISHED IN THIS CASE THE MICHIGAN SOBRIETY ROADBLOCK PROGRAM VIOLATES THE FOURTH AMENDMENT BALANCING TEST.

Even if this Court were to conclude that the constitutionality of the seizures involved in a sobriety roadblock is to be assessed under a balancing test, the program proposed by the Michigan State Police must fail that test.

At the trial, the parties presented significant evidence bearing on this balancing test, with particular emphasis

[2] It does not follow, however, that all roadblock-type seizures imposed by state or local governments would necessarily be found in violation of the United States Constitution. For example, roadside weigh stations, vehicle inspection checkpoints, and other routine regulatory inspections which are not expressly designed for the enforcement of criminal laws would be subject to a balancing test and could well be found constitutionally permissible on that basis. For example, under Michigan law, the State Police may establish temporary vehicle checklanes on roadways throughout the state to detect defective equipment in automobiles. MCL 257.715(b). The equipment violations detected in such searches or seizures are not subject to criminal charges. MCL 257.683(5). Under *Von Raab*, such seizures would be subject to a balancing test.

on the alleged efficacy of roadblock seizures instituted by the Michigan State Police. The court then evaluated the facts established at trial under the Fourth Amendment balancing test prescribed in *Brown v. Texas*, 443 U.S. 47 (1979):

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

Brown v. Texas, 443 U.S. at 50-51 (citations omitted).

Before proceeding to an analysis of the three factors specified in *Brown*, in the light of the record presented here, this brief will address several preliminary issues raised in the briefs *amicus curiae* which have been filed in this Court.

A. The Scope Of The Court's Review Of The "Facts" Presented In The Briefs *Amicus Curiae*.

Ten *amicus curiae* briefs have been filed with the Court in this case. While the focus and analysis contained in each are somewhat different, these briefs share one common thread. Each has attempted to place before this Court statistical data and other evidence allegedly bearing on the central issue which was adjudicated at trial – the effectiveness of sobriety roadblocks in addressing the drunk driving problem.

The data which *amici curiae* attempt to present and the conclusions allegedly supported by that data were, in

all significant respects, incontrovertibly rejected at trial. Dr. Ross testified that his work on the deterrence of drunk driving required him to review every major study published on this subject (App. 41a). Dr. Ross also stated unequivocally that no study of sobriety roadblocks has demonstrated any long-term deterrent effect resulting from their operation (App. 56a). With but one exception, Dr. Ross's views regarding the inadequacy of any statistical support for sobriety roadblocks were completely uncontradicted at trial.[3]

In light of Dr. Ross's testimony, the facts and conclusions which *amici curiae* attempt to present to this Court are, to a large extent, not additions to the record, but rather, they are directly contrary to the only evidence presented to the trial court on this point.

There is, moreover, an additional difficulty presented by the data which *amici curiae* would offer. Since the studies which allegedly support the efficacy of sobriety roadblocks are introduced for the first time in this Court, these studies and their conclusions were not subjected to cross-examination or other tests of their weight during the trial process. In essence, *amici curiae* invite a retrial before this Court of the central issue litigated at the

[3] Defendants did attempt to rely on a Maryland sobriety roadblock program conducted during the years 1982 and 1983. However, this reliance was rejected by the trial court, which agreed with Dr. Ross that the Maryland study did not demonstrate any deterrent effect (App. to Pet. for Cert. 85a-95a). Moreover, Defendants' own witness, Lieutenant Cotton of the Maryland State Police, was forced to concede that the only study of the Maryland program did not demonstrate any deterrent effect (App. 119a; Tr. Vol. II, p. 87).

trial court, without according Plaintiffs the benefit of adversarial proceedings.

This process significantly prejudices the Plaintiffs and also deprives this Court of any accurate assessment of the value of the "evidence" being presented by *amici curiae*. *See* Miller and Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 Va. L. Rev. 1187, 1202 (1988).[4]

The course of the trial in this matter demonstrates the importance of subjecting the "evidence" presented by *amici curiae* to the adversarial process. At trial, Defendants placed considerable reliance upon the experience of the State of Maryland's sobriety roadblock program and the studies which were performed in conjunction with it. The Defendants also called as a witness Lieutenant Raymond Cotton of the Maryland State Police. On direct examination Lieutenant Cotton explained the Maryland studies which he had helped prepare, and, on the basis of these studies, he asserted that sobriety roadblocks are an effective deterrent against drunk driving (App. 118a).

[4] Plaintiffs acknowledge that there is a well-established history of so-called Brandeis briefs in this Court. It is, however, important to note the observations made by the Court in accepting the non-record evidence contained in the original Brandeis brief: "(W)e take judicial cognizance of all matters of general knowledge." *Mueller v. Oregon*, 208 U.S. 412, 421 (1908). In contrast to the evidence submitted by *amicus curiae* in *Mueller*, *amici curiae* herein have produced data and conclusions which are far from matters of general knowledge, but, instead, go to the central factual issue litigated at trial.

Lieutenant Cotton was then subjected to lengthy cross-examination regarding the methodology and conclusions of the Maryland studies as well as the broader context in which these roadblocks were imposed. At the conclusion of that cross-examination, he was forced to concede that the deterrent effect of the subject roadblocks was not supported by any empirical evidence (App. 119a; Tr. Vol. II, p. 87). And, on the basis of this cross-examination, the trial court concluded that the Maryland experience with sobriety roadblocks did not substantiate any deterrent effect (App. to Pet. for Cert. 87a-92a).

Like the various studies cited by *amici curiae*, the Maryland studies deemed sobriety roadblocks a success. However, when subjected to the adversarial process, that claimed success proved entirely illusory. This experience reaffirms that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *cf. California v. Green*, 399 U.S. 149, 158 (1970). Quite obviously, Plaintiffs will not have the opportunity to analyze the studies and data cited by *amici curiae* or to expose their weaknesses through cross-examination.[5] For these reasons, the invitation by *amici curiae* to consider non record "facts" or evidence is not only prejudicial to the Plaintiffs, but also contrary to the fundamental structure of the adversary system.

[5] For these reasons, the Michigan Court of Appeals issued an order striking any references to matters not contained in the trial record from the brief which Defendants filed in that Court.

The citation to studies and other data outside the record is also inconsistent with this Court's rulings in various Fourth Amendment cases. In *Prouse*, 440 U.S. at 659, the Court based its conclusion that a particular law enforcement procedure was ineffective solely on the evidence presented at trial:

> The question remains, however, whether in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail. *On the record before us*, that question must be answered in the negative.

Prouse, 440 U.S. at 659 (emphasis added).

The Court's exclusive focus on the actual record in *Prouse* has been repeated in its evaluation of the efficacy of other searches and seizures challenged under the Fourth Amendment. *See e.g. Skinner*, 109 S.Ct. 1402, 1421 (1989) (The Court of Appeals erred because the record indicates that toxicology tests are highly effective.); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976) (The need for immigration checkpoints is demonstrated by the records in the cases.).

Two *amici curiae* have asserted that this Court may consider evidence which is not a part of the record because the issue of whether sobriety roadblocks are an effective law enforcement tool is a "legislative fact."[6] This

[6] This argument is contained in the briefs *amicus curiae* filed by the United States (p. 21), and the National Governors' Association, *et al.* (pp. 16-17).

argument is, however, directly contrary to the Court's decision in *Prouse*, 440 U.S. at 659, which applied the balancing test only to the actual record presented.

In an effort to support their position that the alleged efficacy of roadblocks involves "legislative facts," both *amici curiae* cite *Lockhart v. McCree*, 476 U.S. 162 (1986). In dictum in that case, the Court expressed reservations regarding the applicability of the "clearly erroneous" standard of review contained in Federal Rule of Civil Procedure 52(a) to the trial court's findings. 476 U.S. at 168, n.3. The Court's observations in *Lockhart* might bear on the scope of its own review of the record presented below, but *Lockhart* provides no justification whatsoever for a consideration of facts which are not contained in the record.[7]

---

[7] The United States has also argued that because the Michigan sobriety roadblock program was operated only once, this case involves a facial constitutional challenge which "cannot be evaluated on its own record." Brief *amicus curiae* of the United States, p. 21. This argument is extremely ironic in that the instant case probably contains the most extensive factual record ever developed on the question of the effectiveness of sobriety roadblocks. But this argument also misses the point. If the present case involves a facial challenge, it is a facial challenge to a particular roadblock program which was designed by its proponents to accomplish a particular goal. Thus, when the Defendants conceded at trial that their program cannot be justified on the basis of the limited number of arrests which it accomplishes, and the uncontroverted testimony at trial demonstrated a direct relationship between arrests and any possible deterrence, this case can indeed be "evaluated on its own record."

For the foregoing reasons, the constitutional balancing test must be conducted in light of only that evidence adduced and tested at trial. The asserted "facts" recited in the *amicus curiae* briefs must not be given any weight in the balancing process.

B. The Non-Record "Facts" Presented By *Amici Curiae*.

The record in this case should provide the sole factual basis for this Court's decision. However, even if this Court were to consider the submissions of *amici curiae* which are not part of this record, the effectiveness of sobriety roadblocks still cannot be established.

For example, six *amici curiae* rely upon the results of a 1984 study of two counties in Maryland and Virginia to support the view that sobriety roadblocks increase the public perception of enforcement of drunk driving law. *See* Williams & Lund, *Deterrent Effects of Roadblocks on Drinking and Driving*, 3 Traffic Safety Evaluation Res. Review 7 (1984). Not surprisingly, *amici curiae* omit from their briefs any mention of this study's conclusion: namely, that sobriety roadblocks had no effect whatsoever on the driving behavior of the public in the two counties analyzed. Id. at 17. The Williams and Lund study thus supports, rather than refutes, the evidence presented at trial and the factual findings made by the trial court.

A number of *amici curiae* have also referred to the approval of the sobriety roadblock concept by the National Transportation Safety Board (NTSB). National Transportation Safety Board, *Deterrence of Drunk Driving:*

The Role of Sobriety Checkpoints and Administrative License Revocation, NTSB/SS-84/01, Washington D.C. (1984). Yet, in this study, the NTSB found that sobriety roadblocks "are not the most efficient arrest-producing technique . . . " *id.* at 9, and it further determined that no study which it reviewed established a direct relationship between sobriety roadblocks and a reduction in alcohol related accidents. *Id.* at 7, 9. It was only because the NTSB determined that roadblocks "could" produce a deterrent effect or were "believed" to have such an effect, that it recommended this technique. *Id.* at 5.

Several *amici curiae* have also cited regulations promulgated by the National Highway Traffic Safety Administration (NHTSA) as supportive of the efficacy of a sobriety roadblock program. Yet, the NHTSA has itself published a study which concluded that no deterrent effect was demonstrated through use of a roadblock program. NHTSA, 3 *Traffic Safety Evaluation Research Review* 5, Nov.-Dec. 1984.

Another study which was not part of the record in this case concerns a Charlottesville, Virginia sobriety roadblock program conducted during 1984. As several *amici curiae* have pointed out, this study found that alcohol related accidents in Charlottesville decreased during the year that the roadblocks were in operation. Again, however, *amici curiae* have omitted mention of critical facts pertaining to this study. During the period of the Charlottesville study, alcohol related accidents declined in the entire State of Virginia, and the authors of the Charlottesville study noted that this state-wide decline may have been caused by legislation enhancing drunk driving penalties which became effective in Virginia in

1984. Department of Transportation HS 806 989, *Evaluation of Charlottesville Checkpoint Operations*, p. 45. As a result of the state-wide reduction in alcohol related accidents and the unknown effect of the 1984 legislation, the Charlottesville study did not find the reduction of alcohol related accidents in that city to be sufficiently significant to be attributed to sobriety roadblocks. *Id.* at 46.

Moreover, the Charlottesville study further demonstrated that, despite the visibility of the roadblock program, drivers in that area did not perceive sobriety roadblocks as increasing the probability of being arrested for drunk driving. *Id.* at 31. Ultimately, the Charlottesville study found that the accumulated data do not permit a final conclusion regarding the effectiveness of these roadblocks.

Amici curiae have also attempted to rely on a roadblock program which has been instituted in Australia. However, for the reasons stated in the brief *amicus curiae* filed on behalf of the Insurance Institute of Highway Safety, *et al.*, at 13-14, n. 43, the results obtained in Australia cannot be attributed to roadblocks alone, nor, in light of the significant differences between the Australian program and the Michigan program, can the Australian results be applied to this case.

Space limitations do not allow Plaintiffs to note the specific flaws of each non-record "fact" regarding the potential efficacy of sobriety roadblocks which *amici curiae* would have this Court consider. However, for reasons similar to those noted in critiquing the aforementioned "data," none of the "evidence" contained in the briefs *amicus curiae* filed in this case detracts from the central

finding below that the sobriety roadblock program involved in this case will neither be an effective arrest tool nor have any long term deterrent effect.

C. The Constitutional Balancing Test.

1. Gravity of the Public Concern.

Plaintiffs do not dispute that drunk driving is a serious societal problem. Rather, Plaintiffs have contended and the trial record established that sobriety roadblocks constitute an ineffective as well as unconstitutional response to that problem.

2. The Degree to Which the Seizures Advance the Public Interest.

This element of the Fourth Amendment balancing test was the central focus of the evidence presented below. That evidence demonstrated that sobriety roadblocks are ineffective in addressing the serious problem of drunk driving.

Dr. Lawrence Ross testified that as a means of directly removing drunk drivers from the road through on-the-scene arrests, sobriety roadblocks are "worthless" (App. 56a). This assessment of the inadequacy of sobriety roadblocks as an arrest tool was shared by every witness at trial. Indeed, Dr. Ross's conclusions were completely supported by Defendants' own witnesses.

Colonel Hough and Inspector Leroy Fladseth of the Michigan State Police both acknowledged that the statistical evidence involving sobriety roadblocks demonstrated that these roadblocks could not be justified by the

limited number of arrests achieved (App. 77a; Tr., Vol III, p. 27).

For these reasons, the Defendants did not even attempt to justify sobriety roadblocks on the basis of the number of arrests obtained. Instead, the Guidelines authored by the Michigan State Police identified deterrence of drunk driving as the program's goal. (App. to Pet. for Cert. 146a.) Based on this overwhelming and uncontradicted evidence, the trial court found that "sobriety checkpoints have not been shown to be an effective means for apprehending drunk drivers." (App. to Pet. for Cert. 83a.)

While Defendants conceded that sobriety roadblocks could not be deemed effective on the basis of the limited number of arrests attained, they claimed that sobriety roadblocks might nonetheless reduce the incidence of drunk driving in Michigan by acting as a deterrent. As the trial court found, though, Defendants' deterrence argument was equally unsupportable.

Dr. Ross testified that any enforcement program which raises the public consciousness with respect to the drunk driving problem and holds out the prospect of increased risk of detection may have a short-term positive effect on drunk driving statistics. However, as Dr. Ross explained, the long term effect of any drunk driving program must be based on the public's perception that the program does, in fact, enhance the prospect of arrest for drunk driving. In Dr. Ross's terms, the driving public is subject to a learning curve – once it learns that the

prospect of being detected and punished for drunk driving is not as great as it was led to believe, any potential deterrent effect ends.

The significance of Dr. Ross's testimony was fully explored by the trial court, which made a number of critical factual findings. The trial court noted that Dr. Ross's testimony regarding the relationship between arrests and deterrence was uncontradicted (App. to Pet. for Cert. 79a, n. 10), and, on this basis, found that "[t]he degree to which a particular law enforcement program can be successful in achieving arrests must be seen as directly related to the program's usefulness in deterring a problem" (App. to Pet. for Cert. 77a).

Based on the relationship between the number of arrests and the deterrent value of the sobriety roadblock program, the trial court concluded:

> [S]obriety checkpoints cannot be expected to achieve any significant level of apprehending drunk drivers. This finding, in the Court's opinion, essentially undermines the whole theoretical basis for concluding that checkpoints can be effective in deterring drunk drivers, (i.e., that the public would fear being arrested for drunk driving if sobriety checkpoints were implemented, and thus, would not engage in drunk driving). Once the public perceives the truth about the low chance of a drunk driver actually being apprehended in a sobriety checkpoint, it cannot be reasonably supposed that those who are inclined to drink and drive will perceive a sobriety checkpoint as a significant threat to their being arrested.

App. to Pet. for Cert. 95a-96a.[8]

Thus, as the trial court found, Defendants cannot concede that sobriety roadblocks achieve few arrests and, at the same time, attempt to justify the imposition of these intrusions on the basis of a speculative deterrent effect.[9]

---

[8] The trial record in this case demonstrates that there is an additional factor at work which undermines any significant deterrent effect of sobriety roadblocks. There is no dispute among any of the parties in this case that, to the extent any positive effect can be achieved through a roadblock program, it must come about because sobriety roadblocks are highly visible. Thus, as Colonel Hough testified at trial, media attention focusing on such a program is a necessity (Tr. Vol. I, pp. 90-91). However, Colonel Hough acknowledged that media coverage of sobriety roadblocks will necessarily wane over time (Tr. Vol. I, p. 92). This phenomenon was confirmed by Lieutenant Cotton, who indicated that publicity of the Maryland roadblock program dropped off after an initial flurry (Tr. Vol. II, p. 120). The Charlottesville study, which several *amici curiae* have cited to this Court, also noted this pattern. Driver awareness of the Charlottesville roadblock program was higher four months after its inception than it was seven months later due to reduced media coverage. DOT HS 806 989, pp. 26-27. Since the underlying rationale of a deterrence based roadblock program is to increase public perception of the risk of arrests due to this procedure, the natural reduction in media attention will correspondingly reduce whatever deterrent effect the Defendants might rely upon.

[9] Perhaps because of Dr. Ross's testimony and the trial court's conclusions, the Defendants have now completely

(Continued on following page)

In an attempt to counter this uncontradicted evidence, the Defendants initially relied upon statistics derived from a State of Maryland sobriety roadblock study to suggest a possible deterrent effect. However, the two representatives of the Michigan State Police who had any familiarity with the Maryland study, Colonel Hough and Lieutenant Slaughter, candidly acknowledged that they knew of no data from Maryland supporting the view that sobriety roadblocks act as a deterrent (App. 78a-79a, 122a).

Defendants also called Lieutenant Raymond Cotton of the Maryland State Police, who had helped author the report on the Maryland study. Yet, even Lieutenant Cotton ultimately was required to acknowledge that the Maryland sobriety roadblock program was not shown to have had any deterrent effect (App. 119a; Tr. Vol. III, p. 87).

(Continued from previous page)

reversed their position on this point. At trial, Defendants' witnesses asserted that the Michigan sobriety roadblock program was not designed to achieve significant numbers of arrests (App. 77a), and that the number of arrests obtained by means of roadblocks was "not all that important" to the program's success (Vol. III, p. 27). In their brief before this Court, however, Defendants have repeatedly suggested that sobriety roadblocks can be justified on the basis of the number of arrests obtained (Brief for Petitioners, pp. 20, 40, 46, 48, 49). The Defendants' striking reversal is not only a repudiation of *all* evidence presented on this point at trial, it is also a repudiation of Defendants' own Guidelines which identify deterrence, not number of arrests, as this program's goal (App. to Pet. for Cert. 146a).

The statistics derived from the Maryland study were addressed at length in the trial court's opinion (App. 83a-92a). Based on this analysis, the trial court concluded that the Maryland data "does not support the deterrent effects of checkpoints" (App. 92a).

In addition to demonstrating that sobriety roadblocks are not effective in arresting or deterring drunk drivers, Plaintiffs also presented considerable evidence indicating that the roadblock program proposed by the Michigan State Police is, at best, unnecessary in the fight against drunk driving, or, at worst, counterproductive.

Dr. Ross noted that the Michigan sobriety roadblock program could have the opposite effect from that contemplated by its proponents. As Colonel Hough testified, under the Defendants' Guidelines, only one sobriety roadblock would be in operation on any given night, and the county in which the roadblock is to be employed would be announced in advance and given extensive publicity (App. 80a). Dr. Ross noted that such a program would be no threat whatsoever to an individual outside the targeted county. Even worse, he further testified that the resulting program could actually be counterproductive, by suggesting to drivers outside the targeted county that their chances of being detected for drunk driving were reduced because of the concentration of police resources elsewhere (App. 74a).

Furthermore, the three county sheriffs who testified at trial each indicated that the Michigan roadblocks, which require eight to twelve officers to be stationed at a specific location, would constitute a less effective use of

police resources than traditional roving patrols. This testimony regarding the efficacy of patrols was substantially corroborated by witnesses from the Michigan State Police who testified that State Police officers receive considerable training in detecting drunk drivers based on objective driving characteristics, and are highly skillful in detecting and arresting such drivers (App. 120a-121a; Tr. Vol. I, pp. 65-66).

After reviewing the entire record, the trial court concluded that sobriety roadblocks are neither an effective means of detecting drunk drivers, nor do they have any significant deterrent effect. (App. 101a-102a.)

The Michigan Court of Appeals affirmed these findings. *Sitz v. Department of State Police*, 179 Mich App 433; 429 NW2d 180 (1988). That court noted that the State Police Guidelines recognized the necessary relationship between actual arrests obtained and any deterrent value to be achieved through the program. *Id.* at 441. The Michigan Court of Appeals further noted that the Guidelines on which the State Police program is based provide that the roadblocks' primary objective is to "increase the perception of 'risk of apprehension' in the minds of [drinking] drivers." *Id.* Since the evidence that sobriety roadblocks are not an effective means of achieving arrests was uncontradicted, *id.* at 442, the Michigan Court of Appeals affirmed the trial court's determination that "sobriety checkpoints [are] not an effective means of combating drunk driving." *Id.* at 443; App. 20a.

Both the trial court and the Michigan Court of Appeals, therefore, found that the second element of the *Brown v. Texas* balancing test weighed in favor of Plaintiffs. Defendants seriously misstate the conclusions rendered below in asserting that sobriety roadblocks were found by these courts to be somewhat effective. In actuality, the Michigan Court of Appeals held that the trial court was correct "in finding that sobriety checkpoints were not an effective means of combating drunk driving." *Sitz*, 179 Mich App at 443.

3. The Severity of the Interference with Individual Liberty.

The final factor in the *Brown v. Texas* standard requires an examination into the extent of the intrusion caused by sobriety roadblocks. This determination has usually been divided into two components, the objective and subjective nature of the intrusion. *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-559 (1976).

Based on the short amount of time that each car is required to stop, the trial court concluded that the objective intrusion of a sobriety roadblock was minimal (App. to Pet. for Cert. 104a). However, this analysis of the original stop does not take into consideration all the factors relevant to the objective intrusion.

First, based on the statistics generated in almost every sobriety roadblock study that has been conducted, over 99% of the automobiles subjected to this form of intrusion will be allowed to pass through the roadblock without an arrest for criminal activity. To accurately reflect the scope of the intrusion posed by sobriety roadblocks, the Court's balancing test must, therefore, not be confined to the intrusion upon a single automobile.

Rather, this Court should consider the legion of responsible and lawful drivers who would be unnecessarily subjected to this type of intrusion, however brief. In assessing the intrusiveness of roadblock seizures, the Court must take into account their overall impact on legitimate traffic. *United States v. Martinez-Fuerte*, 428 U.S. at 558-559; *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-883 (1975); *see generally* Strossen, *The Fourth Amendment In The Balance*, 63 N.Y.U. L. Rev. 1173 (1988).

The scope of sobriety roadblocks' intrusiveness is significantly broader than that contained in a single brief stop for an additional reason. If suspicionless seizures of automobiles and their occupants at a sobriety roadblock were permitted, several results would necessarily follow which would involve substantial intrusion into individual privacy and liberty. After effectuating the stop of an automobile at a sobriety roadblock, the officer could compel the car's driver and passengers to get out of the car, *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); once the occupants are out of the vehicle, the officer could subject them to pat-down searches, *id.* at 111-12; the officer could further require the driver to produce a license or other vehicle documents, *Texas v. Brown*, 460 U.S. 730 (1983); should the driver open the car's glove compartment to produce these documents, the officer could shift position to examine the contents of the glove compartment, *id.*; and the officer could shine a flashlight into the car's passenger compartment and visually inspect its contents and occupants, *id.*

During cross-examination, Inspector Fladseth acknowledged that all of the foregoing actions would be

constitutionally permissible if the original roadblock seizure is adjudged constitutional. He further acknowledged that there is an undeniable potential for police abuse in such a program (Tr. Vol. III, pp. 50-51).

Another aspect of the sobriety roadblock program designed by the Michigan State Police further increases the intrusion inherent in all roadblock seizures. Defendants and *amici curiae* have alleged that the roadblock approach removes discretion from the officer conducting the stop. But this is only partially correct. By requiring roadblock officers to stop *all* cars, the Michigan program does deny the officers any discretion in selecting which cars will be subject to a brief initial stop. However, as the evidence presented at trial established, the critical determination of whether a driver is to be detained for additional and more intensive investigation and testing is left totally to the discretion of the officer conducting the stop.

Colonel Hough testified that it was up to the checkpoint officer to determine who would be detained further (App. 81a). Lieutenant Slaughter elaborated on this discretion. According to him, an officer could look to a number of factors in making the decision to detain a motorist for further examination. The officer could base his decision on a strong odor of alcohol in the car, the condition of the driver's clothing, or whether the driver's shirt was completely buttoned (App. 124a-125a). Lieutenant Slaughter further testified that any one of these factors could be enough to convince the roadblock officer to require further investigation of the driver (App. 126a). Lieutenant Slaughter even acknowledged that a driver could be required to submit to further testing for no objective reason whatsoever (App. 127a).

Defendants have sought to minimize the intrusiveness of their roadblock program by suggesting that the Guidelines which they have drafted remove any authority from the officers in the field. This claim is, however, belied by the testimony of Colonel Hough and Lieutenant Slaughter. That uncontradicted evidence conclusively shows that, in fact, roadblock officers necessarily exercise wide discretion in determining which detained motorists will be subjected to additional and far more invasive investigations. This substantial discretion inevitably vested in roadblock officers perhaps accounts for another disquieting statistic revealing the substantial intrusiveness of roadblock programs.

Defendants' brief announces that the May 1986 roadblock conducted in Saginaw County was "a successful operation." (Defendants' Brief, p. 11.) This announcement comes without explanation for the limited number of arrests achieved during that roadblock, and without comparison of the number of arrests which could have been achieved if the 17 officers participating in that operation had each spent an equal amount of time using traditional police methods. Even putting these concerns aside, the record also shows that of the 126 drivers who passed through that roadblock, only two were detained for further examination and questioning, and only one of these two was arrested (Tr. Vol. III, p. 89). Thus, after being screened by the initial roadblock officer, as many drivers were released after being forced to undergo further examination and testing as were arrested for drunk driving. Such serious intrusions into the privacy interests of

innocent drivers have also been documented in other, more extensive studies of sobriety roadblock operations.[10]

The foregoing statistics demonstrate that sobriety roadblocks constitute a significant intrusion into the privacy interests of numerous law abiding citizens. *See generally,* Jacobs and Strossen, 18 U. Cal. Davis L. Rev. at 650-652 (1985). These additional concerns must be considered in assessing the nature of the objective intrusion.

In addition to their objective intrusiveness, sobriety roadblock stops further invade privacy through their significant subjective intrusiveness, as both the trial court and the Michigan Court of Appeals found. After extensive analysis of both the record and relevant judicial opinions, the trial court concluded that "the subjective intrusion on individual liberty interests which would be

---

[10] The only other evidence on this point considered at trial demonstrated even more severe intrusions into the privacy interests of innocent motorists. During Maryland's sobriety roadblock program, forty drivers were forced to undergo more extensive investigations, but only 17 of these were eventually arrested (Tr. Vol. II, pp. 64-66). Maryland's study indicates that the individuals subjected to full-fledged investigations at sobriety roadblocks are more likely than not completely innocent of drunk driving offenses. The number of sobriety roadblock "false positives" is even more striking in the non-record studies which *amici curiae* would have this Court consider. For example, in the Charlottesville study approximately 940 people were detained for further investigation, but only 290 of these individuals were arrested for drunk driving. DOT HS 806 989, p. 5. In a Delaware study, 701 people were further detained and investigated, after which only 231 were arrested. NTSB/SS-84/01, p. 10.

caused by the sobriety checkpoints was substantial." (App. to Pet. for Cert. 123a-124a.) The Michigan Court of Appeals held that there was sufficient evidence to support the trial court's conclusions on this point. (App. to Pet. for Cert. 22a.)

The roadblocks designed by the Michigan State Police are to be conducted at night. A driver approaching a roadblock may well be traveling on a darkened, little traveled state highway when confronted by a sign announcing a roadblock. Approximately a quarter of a mile later, that driver would discover a large area illuminated by four halogen lights, containing eight to 12 police officers, numerous police cars, and other support vehicles. Fear and anxiety would be an understandable reaction to such a scene. As the court observed in *State v. Smith*, 674 P.2d 562 (Ok. Crim. App. 1984):

> The roadblocks in the present case could well act, and most likely did act, as a total surprise to those passing through. The fear factor involved in this case is heightened by the presence of at least 10 officers, chemical testing equipment, and mobile booking and jail vans actually on the scene. To the individual approaching such a roadblock, it is not unlikely that he would reasonably perceive the officers as being desirous of arresting criminals, and that anyone passing through could easily be arrested.

Id. at 564.

Unlike the roadblocks considered in *Martinez-Fuerte*, 428 U.S. at 559, the roadblocks involved in this case will be conducted at night and are not fixed, but will instead be moved to different locations. And, far from attempting

to minimize a driver's surprise, sobriety checklanes are based precisely on surprise.

D. Application Of The Balancing Test To The Record.

The record in this case demonstrates that the sobriety roadblocks proposed by the Michigan State Police simply do not accomplish the goal of detecting or deterring the drinking driver. The failure of such roadblocks to promote any legitimate public interest renders them unreasonable under the constitutional balancing test.

Absent proof of the effectiveness of such roadblocks, the Michigan State Police would seek to justify an official intrusion based solely on the existence of a serious public concern, which, regardless of its gravity, is not effectively addressed by the seizures being imposed. But, the serious public concern with drunk driving cannot, alone, justify any governmental intrusion. Rather, even a minimal intrusion into an individual's privacy or security will be deemed reasonable only if it actually promotes a governmental interest.

The Court so ruled in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), which involved the suspicionless searches of automobiles near the United States-Mexico border. The government sought to justify these intrusions based on the intractable problem of illegal immigration. The Court, however, rejected this rationale: "It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one." 413 U.S. at 273. Similarly, the fact that drunk driving is a

serious problem in the State of Michigan cannot, in and of itself, allow the mass seizure of innocent motorists proposed by the Defendants.

In short, this Court's constitutional balancing test mandates the conclusion that any suspicionless seizure which does not effectively promote a governmental interest is unreasonable under the Fourth Amendment. Accordingly, the Michigan State Police sobriety roadblock program is constitutionally defective.

Defendants and *amici curiae* have suggested that other attributes of a sobriety roadblock program tip the balance in favor of its constitutionality. They particularly emphasize that the roadblocks will assertedly remove any discretion from the field officers engaged in the seizure.[11] Even assuming, *arguendo*, that police discretion actually were minimized, this factor alone could not tip the balancing test in favor of sobriety roadblocks. In so arguing, Defendants and *amici curiae* exaggerate the weight which should be accorded to reduced police discretion.

This Court explored the appropriate role of constrained discretion on the Fourth Amendment balancing equation in *United States v. Martinez-Fuerte*, 428 U.S. at 557-559. In that case, the Court held that the routine

---

[11] As noted previously, only the decision involving which cars will be subjected to the initial stop is removed from the discretion of the officer at the scene. In contrast, decisions concerning which drivers will be subjected to prolonged detention and investigation are vested solely in the officer's discretion. And, as Inspector Lieutenant Slaughter acknowledged, the officer could exercise that discretion for any reason or for no reason (App. 127a).

nature of a roadblock-type stop was relevant to the third factor in the balancing test discussed above, the scope of the intrusion. In *Martinez-Fuerte*, the Court found that a fixed checkpoint stop at the border did not intrude significantly into motorists' privacy rights. 428 U.S. at 557-559. In arriving at this conclusion, the Court distinguished checkpoint stops from random stops of automobiles, which raised "a grave danger that such unreviewable discretion would be abused by some officers in the field." 428 U.S. at 559. *See also Delaware v. Prouse*, 440 U.S. at 661.

Martinez-Fuerte demonstrates that the scope of an intrusion may be decreased by a routine program which removes or reduces the amount of discretion vested in officers in the field. But *Martinez-Fuerte* also demonstrates that the reduction of on-the-scene police discretion is merely one of the factors which must be incorporated into the balancing test, as demonstrated by the Court's balancing analysis in that case. The fact that *Martinez-Fuerte* engaged in such a balancing test belies Defendants' suggestion that a search or seizure which involves limited field officer discretion is, *ipso facto*, constitutional.

The mass seizures proposed by the Michigan State Police, therefore, cannot be constitutionally justified solely on the basis that the officer in the field has no discretion in choosing which cars will be subjected to a stop. Nor does the limitation on the officer's discretion exempt the seizures involved herein from the balancing test which this Court has employed. Thus, the limits placed on the officers in the field may minimize to some extent the scope of the intrusion implicit in a sobriety roadblock, *Martinez-Fuerte*, 428 U.S. at 558-559, but this does not alter the fact that the particular stops at issue

here, in contrast to those upheld in *Martinez-Fuerte*, advance no public interest.

The argument that sobriety roadblocks should be upheld because of the allegedly limited discretion vested in field officers is flawed for another reason. It reflects an unduly narrow view of the Fourth Amendment's proper scope. At its most basic, the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government . . . " *Skinner v. Railway Labor Executives' Association*, 109 S.Ct. at 1411. The Fourth Amendment, therefore, governs all forms of official conduct, not simply the conduct of officers on the street. Furthermore, the Fourth Amendment undeniably protects *people* from unreasonable searches and seizures, *Katz v. United States*, 389 U.S. 347, 351-353 (1967). And, from the perspective of a person subjected to a sobriety roadblock, it might be of little interest or consolation that the decision to intrude was made in the state capitol or in the county seat, not by the officer conducting the roadblock.[12] *Cf.* Amsterdam, *Perspectives On The Fourth Amendment*, 58 Minn. L. Rev. 349,

---

[12] This is not to suggest that the vesting of broad discretion in officers on the street does not raise the prospect of serious abuse, worthy of constitutional concern. *United States v. Brignoni-Ponce*, 422 U.S. at 882-883; *see also Kolender v. Lawson*, 461 U.S. 352, 360-361 (1983). But while the existence of unbridled discretion on the part of officers in the street raises constitutional concerns, it does not necessarily follow that the elimination of that discretion insulates a particular intrusion from constitutional attack. If this were so, the Court's reference to and inquiry into a balancing test in *Martinez-Fuerte* would have been unnecessary.

411 (1974). Jacobs and Strossen, 18 U. Cal. Davis L. Rev. 663-664.

Defendants and several *amici curiae* have also asserted that the trial court's execution of the balancing test was flawed by its consideration of other law enforcement methods available to the Defendants to fight drunk driving. This Court has recognized that the reasonableness of a particular seizure does not invariably turn on the possible existence of alternative "less intrusive means." *Skinner*, 109 S.Ct. at 1419, n. 9; *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). The trial court's decision is completely consistent with this principle.

The trial court expended considerable effort identifying the intrinsic ineffectiveness of sobriety roadblocks in terms of both arrests and deterrence (App. to Pet. for Cert. pp. 74a-95a). Only after concluding that such roadblocks were ineffective did the trial court turn to an analysis of other law enforcement techniques (App. to Pet. for Cert. pp. 96a-102a). And, that consideration was entirely warranted. While this Court has refrained from deciding the reasonableness of a particular police practice solely based upon the availability of other, less intrusive means, it has also recognized that the utility of a particular seizure may be affected by the existence of other police practices.

For example, in applying the balancing test in *Prouse* to invalidate spot checks for drivers' licenses as not sufficiently productive to justify the resulting intrusion, the Court specifically noted the existence of alternative enforcement measures: "Given the alternative mechanisms available, both those in use and those that might be

adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment." 440 U.S. at 659.

As *Prouse* held, the constitutional balancing test encompasses not only consideration of a seizure's effectiveness in promoting a particular law enforcement goal, but also the need for that seizure. *See e.g. New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); *Martinez-Fuerte*, 428 U.S. at 556-557; *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967). The trial court explicitly recognized this fact (App. to Pet. for Cert. 75a), and it was in this context that that court considered the evidence of other law enforcement techniques available.[13]

The evidence in this case indicated that sobriety roadblocks are ineffective in arresting or deterring drunk drivers. Moreover, as emphasized by the three county sheriffs who testified at trial, by diverting officers from

[13] The trial court's findings with respect to other available law enforcement mechanisms in the battle against drunk driving also distinguishes this case from several other searches and seizures which this Court has upheld. In a number of cases beginning with *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court has supported the reasonableness of a particular search or seizure by noting it constitutes "the only effective way" to accomplish an important societal good. *Camara*, 387 U.S. at 535; *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983); *Donovan v. Dewey*, 452 U.S. 594, 602-603 (1981); *United States v. Biswell*, 406 U.S. 311, 316 (1972). In contrast, there are other means for detecting and deterring drunk drivers which are more effective than the challenged roadblocks. *Cf.* Jacobs and Strossen, 18 U. Cal. Davis L. Rev. at 616-619.

more effective and efficient methods of removing drunk drivers from the road, sobriety roadblocks actually undermine law enforcement efforts to combat drunk driving.[14]

For these reasons the courts below properly held that the seizures of motorists under the Defendants' sobriety roadblock program is unlawful under a constitutional balancing test.

[14] The balancing test prescribed in *Brown* requires a determination of how a particular official measure advances the public interest. It is, therefore, totally uninstructive and completely irrelevant to suggest (as several *amici curiae* have done in this Court) that the efficacy of sobriety roadblocks is somehow established by a comparison of the arrest statistics achieved through this measure and the rate at which illegal immigrants are detected at fixed border checkpoints, *see Martinez-Fuerte*, or the percentage of positive results in blood or alcohol tests of railroad workers. *See Skinner.*

CONCLUSION

Based on the foregoing, the judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

MARK GRANZOTTO
Counsel of Record

DEBORAH L. GORDON
Attorney for Respondents

WILLIAM C. GAGE
Attorney for Respondents

JOHN A. POWELL
American Civil Liberties Union

DECEMBER 1989

(19)

No. 88-1897

Supreme Court, U.S.
FILED
JAN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Respondents.

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITIONERS' REPLY BRIEF

FRANK J. KELLEY
ATTORNEY GENERAL

LOUIS J. CARUSO
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General

PATRICK J. O'BRIEN
Assistant Attorney General
Attorneys for Petitioners

50 pp

QUESTION PRESENTED

Where the Michigan courts concluded that the proposed Michigan sobriety checkpoint program addresses an issue of legitimate public concern, that it would have some effectiveness, and that objectively it would be only minimally intrusive, is the checkpoint program facially unconstitutional in violation of U.S. Const Amend IV merely because the Michigan courts also found that it would not be as effective as other law enforcement methods and that it would have a potential for generating subjective surprise and fear in some motorists?

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

ARGUMENT

I A SOBRIETY CHECKPOINT PROGRAM WHICH IS CARRIED OUT PURSUANT TO A PLAN EMBODYING EXPLICIT NEUTRAL LIMITATIONS ON THE DISCRETION OF POLICE OFFICERS IS CONSTITUTIONAL, EVEN WITHOUT A SHOWING OF INDIVIDUALIZED SUSPICION OF EACH MOTORIST 1

II IN THIS FACIAL CONSTITUTIONAL CHALLENGE, THE COURT MAY CONSIDER "LEGISLATIVE" FACTS AND ITS SCOPE OF REVIEW IS NOT LIMITED TO WHETHER THE MICHIGAN COURTS' CONCLUSIONS ARE CLEARLY ERRONEOUS 21

III THE MICHIGAN SOBRIETY CHECKPOINT PROCEDURES ARE FACIALLY CONSTITUTIONAL SINCE THEY ARE REASONABLY EFFECTIVE IN ADDRESSING A SERIOUS SOCIAL PROBLEM AND THEY ARE MINIMALLY INTRUSIVE 33

SUMMARY AND RELIEF SOUGHT 42

TABLE OF AUTHORITIES

Page

Cases

Brown v Board of Education, 347 US 483 (1954) 28

Brown v Texas, 443 US 47 (1979) 11,22

Delaware v Prouse, 440 US 648 (1979) 14,19,28,29,30

Griffin v Wisconsin, 483 US 868 (1987) 7,9

Lockhart v McCree, 476 US 162 (1986) 27

Michigan v Long, 463 US 1032 (1983) 40

Muller v Oregon, 208 US 412 (1908) 24

National Treasury Employees Union v Von Raab, 489 US ___; 103 L Ed 2d 685 (1989) 12

New Jersey v T.L.O., 469 US 325 (1985) 5,9,12,14

New York v Burger, 482 US 691 (1987) 10,11,20

Pennsylvania v Mimms, 434 US 106 (1977) 28,38,40

Roe v Wade, 410 US 113 (1973) 28

Page

Schmerber v California,
384 US 757 (1966) 28

Skinner v Railway Labor
Executives Association,
489 US ___; 103 L Ed 2d
639 (1989) 12,38

Terry v Ohio,
392 US 1 (1968) 40

Texas v Brown,
460 US 730 (1983) 39-40

United States v Martinez-Fuerte,
428 US 543 (1976) .....passim

United States v Cortez,
449 US 411 (1981) 41

United States v Ortiz,
422 US 891 (1975) 39

Statutes

MCL 28.6, 764.15 17

MCL 257.215 16

MCL 257.625 et seq 18

MCL 257.683(5) 16

MCL 257.715(2) 15

MCL 436.33a, 436.34a, 436.50 18

Page

Other Sources

Cleary, McCormick on Evidence
(3rd Ed., 1984, 1987 pocket
part) § 334, p. 127 26

Miller and Barron, The Supreme
Court, The Adversary System
and the Flow of Information
to the Justices: A Preliminary
Inquiry, 61 Va. L. Rev. 1187,
1234-1235, n. 121 (1975) 25

Woolhandler, Rethinking the
Judicial Reception of
Legislative Facts, 41 Vand.
L. Rev. 111, 113-114 (1988) 24

ARGUMENT

I

A SOBRIETY CHECKPOINT PROGRAM WHICH IS CARRIED OUT PURSUANT TO A PLAN EMBODYING EXPLICIT NEUTRAL LIMITATIONS ON THE DISCRETION OF POLICE OFFICERS IS CONSTITUTIONAL, EVEN WITHOUT A SHOWING OF INDIVIDUALIZED SUSPICION OF EACH MOTORIST.

Respondents admit that "the Department of State Police designed its sobriety roadblock program to achieve a broader and laudatory public good", but they argue, incorrectly and inconsistently, that the checkpoints "are designed for the express purpose of assisting in the prosecution of drivers who are driving while intoxicated"; that they "are designed to address a major social problem solely through penal sanctions"; and that Petitioners "did not even attempt to justify sobriety roadblocks on the basis of the number of arrests obtained" and instead relied on a

deterrence rationale. Respondents' brief, pp 11, 13, 25. Respondents contend that despite this "broader and laudatory public good", the checkpoints do not serve any "special need" and therefore the program is unconstitutional. Petitioners assert that Respondents are incorrect on the facts, since the checkpoint program does indeed serve both law enforcement and other "special needs", and that they are wrong as a matter of law because they have fundamentally misconstrued this Court's decisions involving an analysis of "special needs."

Although the checkpoints are certainly intended to result in arrests, Respondents' argument that the sobriety checkpoint program is designed only to

assist in the prosecution of drivers is flatly contradicted by the text of the guidelines themselves (App. to Pet. for Cert. 139a-147a). Those guidelines identify drunk driving as "one of our nation's most serious public health, transportation, and safety issues" and state that the principal purpose of the checkpoint pilot program is the "reduction of alcohol-related crashes" and the concomitant traffic fatalities, personal injury and property damage. App. to Pet. for Cert. 140a, 139a. The principal goal is to:

> "Deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents." App. to Pet. for Cert. 146a.

One "integral aspect" of the checkpoint program is to "attain maximum public

awareness and voluntary compliance with OUIL [Operating Under the Influence of Liquor] laws." App. to Pet. for Cert. 145a. Another aspect of the program is to increase the public's perception and understanding of the problem of drunk driving, as shown by the fact that survey cards and informational brochures are to be distributed to drivers passing through the checkpoint. App. to Pet. for Cert. 145a-146a.

Respondents are both inconsistent and factually wrong in asserting that criminal law enforcement is the only purpose of the sobriety checkpoints, but they are also legally wrong in their arguments regarding this Court's analysis of "special needs." Respondents correctly note that this Court has

recognized that "special needs" may exist which create an exception to the Fourth Amendment's normal requirement of a warrant issued upon probable cause. Respondents incorrectly argue, however, that only "special needs" which are unrelated to law enforcement can create such an exception. This Court's decisions clearly show the fallacy of Respondents' arguments.

The "special needs" analysis was apparently first articulated by Justice Blackmun in an opinion concurring in the judgment in New Jersey v T.L.O., 469 US 325, 351-353 (1985), where the Court adopted a standard of "reasonableness" for determining the legality of searches conducted by public school officials. In reaching its decision, the Court applied a balancing test, 469 US at 337-341:

"To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.' Camara v Municipal Court, [387 US 523,] at 536-537, 18 L Ed 2d 930, 87 S Ct 1727. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

" * * * Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."

In his opinion concurring in the judgment, Justice Blackmun emphasized the importance of recognizing that such a

balancing test is an exception to the Fourth Amendment's usual requirements of a warrant and probable cause, 469 US at 351:

"I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable Cause Clause, only when we were confronted with 'a special law enforcement need for greater flexibility.' * * * Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable is a court entitled to substitute its balancing of interests for that of the Framers." (emphasis added.)

Justice Blackmun reiterated this "special needs" analysis in his dissenting opinion in Griffin v Wisconsin, 483 US 868, 881-882 (1987), where a majority of the Court held that a search of a probationer's home by state probation officers based on "reasonable

grounds," rather than a warrant and probable cause, did not violate the Fourth Amendment. In his dissenting opinion, Justice Blackmun agreed that the need for supervision in probation presents a "special need" justifying the application of a balancing test, but he felt that application of the balancing test did not necessarily create an exception to the warrant and probable cause requirements, 483 US at 881:

> "The Court, however, fails to recognize that this is a threshold determination of special law enforcement needs. * * * The presence of special law enforcement needs justifies resort to the balancing test, but it does not preordain the necessity of recognizing exceptions to the warrant and probable-cause requirements."

The text of the opinions in which the "special needs" analysis was first arti-

culated thus flatly contradicts Respondents' assertion that "special needs" must be unrelated to law enforcement.

Respondents' position is further undermined by the fact that this Court has applied a balancing test in many cases which involve criminal law enforcement, either by itself, or in conjunction with some other, non-criminal, purpose. See, for example, New Jersey v T.L.O., supra, 469 US 325 (a teacher's search of a student's purse disclosed evidence of drug dealing which was turned over to the police and later used in juvenile delinquency charges against the student); Griffin v Wisconsin, supra, 483 US 868 (warrantless search of a probationer's home by a probation officer

disclosed a firearm which was later used in a felony prosecution of the probationer); and New York v Burger, 482 US 691 (1987) (warrantless search of automobile junkyard pursuant to state administrative inspection statute disclosed stolen vehicles and parts which formed the basis of felony charges against the owner). Burger is particularly instructive since the opinion, authored by Justice Blackmun, recognizes that "special needs" may exist, and a balancing test may therefore be appropriate, in circumstances which involve administrative as well as penal goals, 482 US at 712:

> "...a State can address a major social problem both by way of administrative scheme and through penal sanctions. Administrative statutes and penal laws may have the same ultimate purpose of remedying the social problem, but they have different subsidiary purposes and

> prescribe different methods of addressing the problem."
> (emphasis in original).

Although the instant case, unlike Burger, does not involve a "closely regulated business", the Michigan sobriety checkpoints do serve both penal goals and other legitimate "special needs" of society.

Throughout the entire history of this litigation, from the time Respondents first filed their complaint and "pre-hearing memorandum" in the Michigan courts in May, 1986, Respondents, Petitioners and the state courts have all agreed that the constitutionality of the sobriety checkpoint seizures should be analyzed under a balancing test, such as that articulated in Brown v Texas, 443 US 47 (1979). The only reason Respondents

give for now attempting to abandon this balancing test is their reliance upon Skinner v Railway Labor Executives Association, 489 US ___; 103 L Ed 2d 639 (1989), and National Treasury Employees Union v Von Raab, 489 US ___; 103 L Ed 2d 685 (1989), which they cite for the proposition that "A suspicionless seizure which serves only to enforce the criminal law violates the Fourth Amendment" (Respondents' brief, page 8). Both cases include a summary of relevant Fourth Amendment principles, and both utilize the concept of "special needs", but they simply do not stand for the principle which Respondents seek to establish.

In National Treasury Employees, supra, 103 L Ed 2d at 702, this Court cites New Jersey v T.L.O., supra, 469 US

at 342, n. 8, and United States v Martinez-Fuerte, 428 US 543, 556-561 (1976), in support of the proposition that individualized suspicion is not an indispensable component of reasonableness in every circumstance. Martinez-Fuerte involved criminal prosecutions for offenses relating to the transportation of illegal aliens. Contrary to Respondents' contentions, the Court specifically said that the determination whether reasonable suspicion is a prerequisite to a valid stop is "a question to be resolved by balancing the interests at stake." 428 US at 556. The Court applied a balancing test and held that individualized suspicion was not a prerequisite to the constitutionality of the checkpoint. 428 US at 360-362. In reaching that conclusion the Court noted that, as in the

instant case, there was a substantial public interest, that the procedures minimized the intrusiveness, that the checkpoint involved a seizure rather than a search, that it did not invade the sanctity of private dwellings, and that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." 428 US at 561.

In New Jersey v T.L.O., supra, 469 US at 342, n. 8, the Court quoted from the traffic-checking decisions in Martinez-Fuerte and Delaware v Prouse, 440 US 648 (1979), and noted that individualized suspicion is not always a prerequisite to the constitutionality of a search or seizure:

> "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field"'".

Despite their contention that sobriety checkpoints are not subject to a constitutional balancing test, Respondents concede (Respondents' brief, page 14, fn. 2) that "roadside weigh stations, vehicle inspection checkpoints, and other routine regulatory inspections" are subject to a balancing test. Even though the same statute (MCL 257.715(2)) authorizes both types of checkpoints, Respondents argue that there is a distinction between them because, they contend, regulatory checkpoints--unlike the sobriety checkpoints at issue in this

case--are "not expressly designed for the enforcement of criminal laws". The distinction urged by Respondents has no support in the decisions of this Court and is simply wrong as a matter of Michigan law.

Because sobriety checkpoints are intended to serve both law enforcement purposes and other "special needs", it cannot be said that they are "expressly designed for the enforcement of criminal laws." Furthermore, even though the Michigan Motor Vehicle Code defines most violations of equipment requirements as civil infractions rather than criminal offenses, MCL 257.683(5), there are provisions of the Code which define certain violations as criminal offenses, see MCL 257.215 (driving an unregistered

vehicle is a misdemeanor). It must also be recalled that state police officers and other peace officers have authority to make arrests even while they are operating a vehicle equipment checkpoint. See MCL 28.6, 764.15.

Michigan law provides several types of sanctions which often overlap each other: criminal law provisions, civil infractions, and administrative sanctions such as the suspension and revocation of drivers' licenses.[1] Thus, the absolute dichotomy which Respondents assert between sobriety checkpoints and other "routine regulatory inspections" simply does not exist under Michigan law.

Furthermore, the artificial distinction which Respondents propose has no

---

[1]In Michigan, driving under the influence of intoxicating liquor or driving with a certain percentage of

support in decisions of this Court. In

---

alcohol in the blood are misdemeanors. MCL 257.625(1)-(4). A third conviction within ten years is a felony. MCL 257.625(6). Driving a vehicle while impaired by consumption of intoxicating liquor is a misdemeanor. MCL 257.625b. In addition to the criminal penalties of imprisonment, fines, and costs, the statutes require the court to order the Secretary of State to suspend the driver's license of the person for periods of up to two years or, for subsequent convictions, to order the license revoked. MCL 257.625(4), (5), (6); MCL 257.625b(2), (3), (4). Michigan also has an "implied consent" statute which provides that a person who operates a vehicle on a public highway is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol in his blood if the person is arrested for driving under the influence of intoxicating liquor or driving with a certain percentage of alcohol in the blood. MCL 257.625c. Refusal to submit to such a chemical test results in the Secretary of State suspending the person's driver's license for a period of six months. MCL 257.625f. The Michigan Liquor Control Act provides that the possession or transport by a minor of alcoholic liquor in a motor vehicle and the possession or transport by any person of alcoholic liquor in an open container within the passenger compartment of a vehicle are both misdemeanors. MCL 436.33a, 436.34a, 436.50.

Martinez-Fuerte, supra, 428 US at 560, n. 14, the Court rejected such a contention:

> "Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendant's position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." (emphasis added.)

Similarly, in Delaware v Prouse, supra, 440 US at 662, the Court cited an earlier opinion and said:

> "Only last Term we pointed out that 'if the government intrudes ... the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.'"

See also, New York v Burger, supra, 482 US at 699-700 (expectation of privacy exists with respect to traditional police searches and to administrative inspections).

In summary, the dichotomy which Respondents propose is not supported as a matter of Michigan law or in this Court's decisions, and if Respondents are correct that sobriety checkpoints are unconstitutional on that basis, the constitutionality of virtually all other types of routine traffic-checking procedures is also called into question. Petitioners submit that the Fourth Amendment does not require such a draconian result.

II

IN THIS FACIAL CONSTITUTIONAL CHALLENGE, THE COURT MAY CONSIDER "LEGISLATIVE" FACTS AND ITS SCOPE OF REVIEW IS NOT LIMITED TO WHETHER THE MICHIGAN COURTS' CONCLUSIONS ARE CLEARLY ERRONEOUS.

Respondents argue that this Court should decide the facial constitutionality of this traffic-checking procedure solely on the basis of evidence and testimony adduced at a state court evidentiary hearing and should limit its review to whether the factual findings of the state trial court are clearly erroneous. As argued in our principal brief, Petitioners contend that the evidence and testimony at the state court hearing is sufficient to sustain the constitutionality of the sobriety checkpoints and that the state courts applied an improper legal standard and burden of

proof by requiring the State to prove, in advance and by conclusive empirical evidence, that sobriety checkpoints are the most effective procedure to combat drunk driving. We contend that under the appropriate balancing test, see Brown v Texas, supra, 443 US at 50-51, the sobriety checkpoints are a reasonable and constitutional seizure since there is an undisputed severe public concern, the checkpoints reasonably advance the public interest, and the severity of the interference with individual liberty is minimal. With particular respect to the question of the effectiveness of this procedure, the undisputed evidence at the state court hearing demonstrates an arrest rate of more than 1% of the vehicles passing through the checkpoint (two arrests out of 127 vehicles) and

demonstrates that the checkpoints would have at least a short-term deterrent effect.

Several of the amicus curiae briefs in the instant case refer to statistical information and studies which were not introduced into evidence at the state court hearing and Respondents contend that this Court should not consider the material. Petitioners submit that the material consists only of "legislative"

facts rather than "adjudicative" facts[2] and is therefore available for this Court's consideration. In the original "Brandeis brief" in Muller v Oregon, 208 US 412 (1908), extra-record information was presented to the Court, not to show that it was necessarily true, but to show

---

[2]One commentator has defined the difference as follows:

> "The paradigm of an adjudicative fact is a description of a past, individual physical or mental phenomenon, the proof of which is in the record. *** A paradigmatic legislative fact is one that shows the general effect a legal rule will have, and is presented to encourage the decisionmaker to make a particular legal rule. There is less a sense that legislative facts are true or knowable because such facts are predictions, and, moreover, typically predictions about the relative importance of one factor in causing a complex phenomenon."

Woolhandler, Rethinking the Judicial Reception of Legislative Facts, 41 Vand. L. Rev. 111, 113-114 (1988) (fn. omitted)

that the information existed and that rational legislators could rely on it. See, Miller and Barron, The Supreme Court, The Adversary System and the Flow of Information to the Justices: A Preliminary Inquiry, 61 Va. L. Rev. 1187, 1234-1235, n. 121 (1975).

So, too, in the instant case. "Legislative" facts are properly available for the Court's consideration in this facial constitutional challenge, not so much to show that they are right and the state court is wrong, but at least to show that there is evidence of the effectiveness of sobriety checkpoints which supports the rationality of the state officials' decision to operate such checkpoints. It is against this evidentiary backdrop that this Court must

decide the legal question of whether the sobriety checkpoint procedure is reasonable and thus facially constitutional.

The adverse consequences of prohibiting courts from considering "legislative" facts and limiting their review only to "adjudicative" facts which have been formally introduced as evidence are widely recognized. A well-known treatise gives an example of the difficulties which would occur under such a rule, Cleary, McCormick on Evidence, (3rd Ed., 1984, 1987 pocket part) § 334, p. 127:

> "A problem would then arise if a trial court had to decide the question of law whether it was constitutional totally to exclude from a bifurcated jury in a capital case persons opposed to the death penalty. After hearing testimony and accepting documentary material, the court might conclude on the basis of the available social science materials that either the death

> disqualification produced conviction prone juries or it did not. The court might bottom its decision of the constitutional issue on this 'finding of fact.' If the social science materials were not clearly inclined to sustain only one conclusion, and the ruling were treated as a factual finding, the ruling whichever way it came out could not be reversed because it would not be clearly erroneous. Law would come to turn on fact and be susceptible to two right answers. Clearly legislative facts are not 'evidence' in the normal sense of the word, and the traditional doctrine of judicial notice still obtains as to them."

This Court has indicated that it is "far from persuaded" that a "clearly erroneous" standard of review applies to "legislative" facts. Lockhart v McCree, 476 US 162, 168-169, n. 3 (1986). Additionally, in many cases the Court has based its decision, at least in part, on consideration of social, economic, political, or scientific data which was not contained within the lower court's

evidentiary record. Among the many examples are Brown v Board of Education, 347 US 483 (1954) (invalidating the concept of "separate but equal" segregated schools); Roe v Wade, 410 US 113 (1973) (where the Court examined historical, social, and medical data in reaching a decision on the constitutional principles governing regulation of abortions); Schmerber v California, 384 US 757 (1966) (evaluating the effectiveness and intrusiveness of blood tests); and Pennsylvania v Mimms, 434 US 106 (1977) (the Court relied on a non-record study of injuries to police officers).

Respondents cite Delaware v Prouse, supra, 440 US 648, and United States v Martinez-Fuerte, supra, 428 US 543, as instances where the Court's "exclusive

focus" was "solely" on the actual evidentiary record presented at trial. Respondents' brief, page 19. Examination of those decisions, however, does not reveal such an absolute position. As we argued in our principal brief, Petitioners' brief, pages 59-60, the Court in Martinez-Fuerte, 428 US at 557, did not cite any evidence in the record when it recognized a deterrent effect to the checkpoint procedures and when it recognized that smugglers were known to use certain highways regularly. Similarly in Delaware v Prouse, 440 US at 658-659, although the Court found that discretionary random seizures were not a sufficiently productive mechanism on the record before it, the Court also appeared to consider other non-record materials. For example, the Court cited to a highway

safety report prepared by the United States Department of Transportation when it said, 440 US 658:

> "Although the record discloses no statistics concerning the extent of the problem of lack of highway safety, in Delaware or in the Nation as a whole, we are aware of the danger to life and property posed by vehicular traffic and of the difficulties that even a cautious and experienced driver may encounter."

Later in the opinion, 440 US at 659, the Court observed that drivers without licenses are "presumably" less safe than other drivers and absent some empirical data to the contrary "it must be assumed" that unlicensed drivers were more likely to be found among drivers who commit traffic violations.

In the instant case it cannot be disputed that Respondents instituted this

litigation as a facial challenge to the constitutionality of Michigan's sobriety checkpoint procedure, particularly when it is recalled that Respondents' complaint was filed before any such checkpoint had been operated in Michigan. The complaint requested injunctive and declaratory relief and although some evidence and testimony was introduced at a hearing in the state court, Petitioners submit that the fundamental question is a legal one: the reasonableness of Michigan's proposed sobriety checkpoint program. Despite the fact that Respondents produced testimony by a witness whose opinion was that sobriety checkpoints would not be effective in the long run, and despite the fact that the trial court "found" that sobriety checkpoints were not effective, the facial

constitutionality of the proposed checkpoints is not insulated from this Court's review. This Court is free to consider "legislative" facts and apply the appropriate balancing test in determining the constitutional "reasonableness" of the sobriety checkpoint program.

III

THE MICHIGAN SOBRIETY CHECKPOINT PROCEDURES ARE FACIALLY CONSTITUTIONAL SINCE THEY ARE REASONABLY EFFECTIVE IN ADDRESSING A SERIOUS SOCIAL PROBLEM AND THEY ARE MINIMALLY INTRUSIVE.

Respondents' brief contains several additional mischaracterizations which require response. For example, Respondents incorrectly assert that Petitioners "conceded" that the sobriety checkpoints could not be deemed effective on the basis of the number of arrests which resulted and they assert that we have "completely reversed" our position on this point. Respondents' brief, pages 25, 27-28, fn. 9. Both the guidelines themselves (see App. to Pet. for Cert. 141a) and the testimony at the state court hearing (see Testimony of Col. Hough at App. 77a and testimony of

Inspector Fladseth at Tr., Vol. III, p 27) indicate that it was not anticipated that the checkpoints would result in high numbers of arrests. Respondents grossly misstate the situation, however, when they assert that Petitioners "conceded" that the arrest rates demonstrate that sobriety checkpoints are ineffective. Deterrence and public information are the primary goals of the sobriety checkpoint program, but the program is also clearly designed to apprehend any drunk drivers who pass through the checkpoint.

The undisputed evidence at trial indicates that two arrests for drunk driving were made out of 127 vehicles which passed through the checkpoint. This, without more, is sufficient to

demonstrate the effectiveness of the program. In addition to the actual arrests made during the single checkpoint which operated in Michigan, the undisputed evidence at trial indicates that the arrest rate at checkpoints throughout the country result in an arrest rate which approximates 1%. Petitioners submit that this, too, is sufficient to demonstrate the effectiveness of the program. Furthermore, evidence on the deterrent effect of sobriety checkpoints demonstrates their effectiveness. As pointed out in our principal brief, Petitioners' brief, page 47, even Respondents' own expert witness, Dr. Ross, testified that sobriety checkpoints do in fact have short-term deterrent effect.

Three county sheriffs testified at the hearing, but the most that may be said of their testimony is that based on their current practices and their understanding of the procedures for the proposed checkpoints, they believed that their current procedures were more effective (Tr., Vol. I, pp. 147, 164, 179-180), but that if the checkpoint program was shown to be an effective deterrent, they would utilize such a program (Tr., Vol. I, pp. 150-151, 175, 182). Contrary to Respondents' assertions at pages 42-43 of their brief, the sheriffs did not testify that sobriety checkpoints undermine law enforcement efforts to combat drunk driving.

At page 27, fn. 8 of their brief, Respondents argue that if the media

coverage of sobriety checkpoints diminishes over time, the effectiveness of the checkpoints would be diminished, but that argument is not supported in the evidentiary record. To the contrary, Lt. Cotton testified that if there is a great deal of publicity the arrest rate might be low but the deterrent effect would be greater and, conversely, if there was little media coverage, the arrest rate would increase. Tr., Vol. II, pp. 36-42.

Respondents acknowledge that the procedures of the sobriety checkpoint result in a limitation on the discretion of police officers in the field in determining which cars to stop, but they argue (Respondents' brief, pp. 32-34) that there is a potential for unconstitu-

tionally intrusive behavio by police officers after a car has been stopped at the checkpoint. That argument is misguided, however, because only the initial seizure itself is at issue in this facial constitutional challenge. If, after a car has been constitutionally seized at a checkpoint, there is further, more intrusive police conduct, other constitutional principles may come into play. Martinez-Fuerte, supra, 428 US at 555, recognized that different traffic-checking practices involve different balances of public and private interests, in Railway Labor Executives, supra, 103 L Ed 2d at 659, the Court observed that the Fourth Amendment "may be relevant at several levels," and in Pennsylvania v Mimms, 434 US 106, 109 (1977), the Court's analysis differentiated between an initial traffic

stop, a request to the driver to get out of the car, and a subsequent frisk.

This Court's decisions have routinely applied Fourth Amendment principles in a variety of automobile contexts. For example, in Martinez-Fuerte, supra, 428 US 543, the Court held that a seizure of an automobile at a fixed checkpoint, and the selective referral of some motorists to a secondary inspection area for brief inquiry, was permissible without any individualized suspicion, but in United States v Ortiz, 422 US 891 (1975), the Court held that a search at such a checkpoint requires a showing of probable cause. Ortiz recognized, however, that the line between a search and a seizure for inspection may not always be clear. 422 US at 897, n. 3, 894, n. 1. Texas v

Brown, 460 US 730 (1983), holds that the police may station themselves in a position to get a better view of an automobile's interior and may shine a flashlight into the interior and seize items in "plain view." In Pennsylvania v Mimms, 434 US 106 (1977), the Court held that a police officer may compel the driver to get out of the car after a valid stop and, if there was reasonable suspicion under the standard of Terry v Ohio, 392 US 1 (1968), the officer could frisk the driver. Pursuant to Michigan v Long, 463 US 1032 (1983), if a police officer possesses a reasonable belief based on articulable facts that a suspect is dangerous and may gain control of weapons, the officer may search those areas in the passenger compartment of the automobile in which a weapon may be

placed or hidden. These types of assessments do not lend themselves to "hard certainties"; rather they involve "probabilities" and "common-sense conclusions about human behavior" from which "a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained person." United States v Cortez, 449 US 411, 418 (1981).

Any number of hypothetical situations can be imagined, but the Court need not reach such issues in determining the validity of the initial seizure at a sobriety checkpoint. Furthermore, if the constitutionality of checkpoints is upheld and a motorist contends that particular police conduct as to him or her is unconstitutional, such a challenge is

readily available in a post-stop judicial review. Martinez-Fuerte, supra, 428 US at 559.

SUMMARY AND RELIEF SOUGHT

Because of law enforcement needs and other "special needs" such as deterrence, public education of the danger of drunk driving, and public safety, the facial constitutionality of Michigan's sobriety checkpoint procedure should be evaluated under a balancing test which weighs both the public and private interests. Under such a balancing test, the sobriety checkpoint procedure is reasonably effective in combatting a serious public problem and is minimally intrusive. That conclusion is apparent from the record of the case and is even more apparent when

other appropriate "legislative" facts are considered. Under all of the circumstances, the sobriety checkpoint program is reasonable and constitutional.

WHEREFORE, Petitioners ask this Court to reverse the judgment of the Michigan courts and declare the Michigan sobriety checkpoint program constitutional on its face.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record
752 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Thomas L. Casey
Assistant Solicitor General
Patrick J. O'Brien
Assistant Attorney General
Attorneys for Petitioners

No. 88-1897 (5)

In The

Supreme Court of the United States

October Term, 1989

Michigan Dept. of State Police and Col. R. T. Davis,
Director of the Michigan Dept. of State Police,
Petitioners,

v.

Rick Sitz, Joseph F. Young, Sr., Dominic J. Jacobetti,
Dick Allen, Keith Muxlow, and Jack Welborn,
Respondents.

On Writ of Certiorari to the Michigan
Court of Appeals

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE INSURANCE INSTITUTE FOR HIGHWAY SAFETY THE ALLIANCE OF AMERICAN INSURERS ALLSTATE INSURANCE COMPANY THE AMERICAN INSURANCE ASSOCIATION AMICA MUTUAL INSURANCE COMPANY FARMERS INSURANCE GROUP OF COMPANIES GEICO GROUP OF COMPANIES HARTFORD FIRE INSURANCE COMPANY LIBERTY MUTUAL GROUP LUMBERMENS MUTUAL CASUALTY COMPANY NATIONAL ASSOCIATION OF INDEPENDENT INSURERS NATIONWIDE MUTUAL INSURANCE COMPANY PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY THE TRAVELERS INDEMNITY COMPANY UNITED SERVICES AUTOMOBILE ASSOCIATION

In Support of Petitioners

Of Counsel:
Ronald G. Precup
Gerst, Heffner, Carpenter
and Podgorsky
1700 K Street, N.W.
Washington, DC 20006

November 14, 1989

Michele McDowell Fields
Andrew R. Hricko
Stephen L. Oesch
Insurance Institute for
Highway Safety
1005 N.Glebe Road
Arlington, VA 22201
(703) 247-1500

MOTION FILED
NOV 14 1989

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Insurance Institute for Highway Safety (the Institute) hereby respectfully moves for leave to file a brief amicus curiae in support of petitioners in this case. The Institute is a nonprofit research and communications organization dedicated to reducing the property and human losses resulting from motor vehicle use. It is joined in its brief by several individual insurance companies and insurance trade associations who are among the Institute's supporters.

The Institute has requested the consent of counsel for both petitioners and respondents for the filing of a brief amicus curiae. Counsel for petitioners has consented. Counsel for respondents has refused his consent. The Institute offers the following reasons in support of its Motion.

INTERESTS OF AMICI CURIAE

The Institute has for many years worked to identify and develop ways of reducing motor vehicle crash losses--deaths, injuries, and property losses.

The Institute is supported by the principal property and casualty insurance companies. Institute research findings and publications are cited by academic, government, business, and other private sector organizations concerned with transportation safety both in the United States and abroad.

The individual insurance companies and insurance trade associations joining this brief have an economic and humanitarian interest in developing and implementing countermeasures to reduce the toll in human life and suffering paid in motor vehicle crashes.

Alcohol use and the part it plays in contributing to highway losses is the subject of a considerable body of research by the Institute and others. The effect of various measures aimed at deterring the alcohol-impaired driver, including use of sobriety checkpoints, is part of this research. The Institute submits that the data resulting from these studies which are unlikely to be

adequately treated by the parties, will afford the court objective information pertinent to balancing the personal and societal interests at issue.

The accompanying brief reviews the research pertinent to the use of sobriety checkpoints.

Respectfully submitted,

Counsel of Record

Michele McDowell Fields
Andrew R. Hricko
Stephen L. Oesch
Insurance Institute for
Highway Safety
1005 N. Glebe Road
Suite 800
Arlington, VA 22201
(703) 247-1500

No. 88-1897

In The
Supreme Court of the United States
October Term 1989

Michigan Dept. of State Police and Col. R. T. Davis,
Director of the Michigan Dept. of State Police,
Petitioners,

v.

Rick Sitz, Joseph F. Young, Sr., Dominic J. Jacobetti,
Dick Allen, Keith Muxlow, and Jack Welborn,
Respondents.

BRIEF OF AMICI CURIAE INSURANCE INSTITUTE FOR HIGHWAY SAFETY THE ALLIANCE OF AMERICAN INSURERS ALLSTATE INSURANCE COMPANY THE AMERICAN INSURANCE ASSOCIATION AMICA MUTUAL INSURANCE COMPANY FARMERS INSURANCE GROUP OF COMPANIES GEICO GROUP OF COMPANIES HARTFORD FIRE INSURANCE COMPANY LIBERTY MUTUAL GROUP LUMBERMENS MUTUAL CASUALTY COMPANY NATIONAL ASSOCIATION OF INDEPENDENT INSURERS NATIONWIDE MUTUAL INSURANCE COMPANY PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY THE TRAVELERS INDEMNITY COMPANY UNITED SERVICES AUTOMOBILE ASSOCIATION

In Support of Petitioners

Of Counsel:

Ronald G. Precup
Gerst, Heffner, Carpenter
and Podgorsky
1700 K Street, N.W.
Washington, DC 20006

Michele McDowell Fields
Andrew R. Hricko
Stephen L. Oesch
Insurance Institute for
Highway Safety
1005 N. Glebe Road
Arlington, VA 22201
(703) 247-1500

November 14, 1989

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... iii

INTERESTS OF AMICI CURIAE..... 2

SUMMARY OF ARGUMENT..... 2

ARGUMENT..... 3

I. ALCOHOL-IMPAIRED DRIVING IS A SERIOUS, WIDESPREAD CRIME THAT CAN BE DETERRED BY HIGHLY VISIBLE ENFORCEMENT PROGRAMS..... 3

II. CHECKPOINTS ARE EFFECTIVE IN DETERRING ALCOHOL-IMPAIRED DRIVING..... 5

A. Sobriety Checkpoints Increase the Public's Perceived Risk of Arrest..... 5

B. Checkpoints In Fact Deter Alcohol-Impaired Drivers..... 8

i. Widely publicized sobriety checkpoints affect drinkers' decisions regarding driving..... 8

ii. Arrest rates are high but intrusion is low at sobriety checkpoints..... 9

iii. Sobriety checkpoints raise the probability of arrest..... 12

iv. Sobriety checkpoints reduce the incidence of alcohol-related crashes..... 13

III. THE CONSTITUTION DOES NOT BAR STATES FROM USING CHECKPOINTS IN THEIR ENFORCEMENT PROGRAMS..... 14

A. Sobriety Checkpoints Result in Minimal Inconvenience to the Public..... 14

B. The Public Approves of Sobriety Checkpoints..... 15

CONCLUSION..... 16

TABLE OF AUTHORITIES

PAGE

STATUTES

23 U.S.C. § 158..... 5

CAL. [Veh.] CODE § 23152(b) (Deering), as amended by 1989 Cal. Adv. Legis. Serv. Ch. 479 (Deering)..... 3

GA. CODE ANN. § 40-6-39(a)(4) (1987 Supp.)..... 3

OR. REV. STAT. § 813.010(1)(a) (1987)..... 3

UTAH CODE ANN. § 41-6-44(1)(a) (1988)..... 3

CASES

South Dakota v. *Dole*, 483 U.S. 203 (1987)..... 5

Delaware v. *Prouse*, 440 U.S. 648 (1979)..... 16

MISCELLANEOUS

M. Fields and A. R. Hricko, *Passive Alcohol Sensors--Constitutional Implications*, 20 The Prosecutor 45 (1986)..... 11

R. Homel, D. Carseldine, and I. Kearns, *Drink-Drive Countermeasures in Australia*, 4 Alcohol, Drugs and Driving 113 (1988)..... 13

Insurance Institute for Highway Safety, *Alcohol Fact Sheet*, Arlington, VA (1989).....3, 4, 10

I. S. Jones and A. K. Lund, *Detection of Drunk Drivers Using a Passive Sensor*, 14 Journal of Police Science and Administration 153 (1986)..... 11

R. K. Jones and K. B. Joscelyn, *Alcohol and Highway Safety 1978: A Review of the State of Knowledge*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Washington, DC (1978)..... 5

R. S. Karpf and A. F. Williams, *Teenage Drivers and Motor Vehicle Deaths*, 15 Accident Analysis and Prevention 55 (1983)..... 12

J. Lacey, *Enforcement and Public Information Strategies for DWI General Deterrence: The Clearwater and Largo, FL Experience*, U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT HS 807-066, Washington, DC (1986)..... 13

D. Levy, D. Shea, P. Asch, *Traffic Safety Effects of Sobriety Checkpoints and Other Local DWI Programs in New Jersey*, 79 American Journal of Public Health 291 (1989)..... 13

A. K. Lund and I. S. Jones, *Detection of Impaired Drivers with a Passive Alcohol Sensor*, Proceedings of the 10th International Conference on Alcohol, Drugs, and Traffic Safety, September 10, 1986, T-86, Elsevier Science Publishers B.V., Biomedical Division, Amsterdam (1987)..... 10

A. K. Lund and A. C. Wolfe, *Changes in the Incidence of Alcohol-Impaired Driving in the United States, 1973-1986*, Journal of Studies on Alcohol (in press 1989)..... 3, 4, 10

G. W. Mercer, *The Relationships Among Driving While Impaired Charges, Police Drinking Driving Roadcheck Activity, Media Coverage*

and Alcohol-Related Casualty Traffic Accidents, 17 Accident Analysis and Prevention 467 (1985)..... 6

H. Moskowitz, M. M. Burns, A. F. Williams, *Skills Performance at Low Blood Alcohol Levels*, 46 Journal of Studies on Alcohol 482 (1985)..... 3

M. R. Pagano and S. P. Taylor, *Police Perceptions of Alcohol Intoxication*, 10 J. of Applied Social Psychology 166 (1980)..... 10

R. C. Peck, D. D. Sadler, and M. W. Perrine, *The Comparative Effectiveness of Alcohol Rehabilitation and Licensing Control Actions for Drunk Driving Offenders: A Review of the Literature*, 1 Alcohol, Drugs, and Driving: Abstracts and Reviews 15 (1985)..... 16

Presidential Commission on Drunk Driving, *Final Report*, Washington, DC (1983)..... 4, 5, 8

H. L. Ross, *Deterring the Drinking Driver: Legal Policy and Social Control*, Lexington Books, D. C. Heath and Co., Lexington, MA (1981)..... 5, 9

U.S. Department of Transportation, National Highway Traffic Safety Administration, *The Use of Safety Checkpoints for DWI Enforcement*, DOT HS 806-476, Washington, DC (1983)..... 8, 14

U.S. Department of Transportation, National Highway Traffic Safety Administration, *Alcohol Involvement Rates in Fatal*

Crashes: A Focus on Young Drivers and Female Drivers, DOT HS 807-184, Washington, DC (1987)..... 12

R. B. Voas, *Enforcement Productivity and Impact: Checkpoints vs. Traditional Patrols*, Presented at the 11th International Conference on Alcohol, Drugs, and Traffic Safety, Chicago, IL (October 27, 1989)..... 9, 12

R. B. Voas, A. E. Rhodenizer, and C. Lynn, *Evaluation of Charlottesville Checkpoint Operation: Final Report*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Washington, DC (1985)..... 7

R. B. Voas and A. F. Williams, *Age Differences of Arrested and Crash-Involved Drinking Drivers*, 47 Journal of Studies on Alcohol 244 (1986)..... 12

A. F. Williams and O. Carsten, *Driver Age and Crash Involvement*, 79 American Journal of Public Health 326 (1989)..... 12

A. F. Williams and A. K. Lund, *Deterrent Effects of Roadblocks on Drinking and Driving*, 3 Traffic Safety Evaluation Research Review 7, U.S. Department of Transportation, National Highway Traffic Safety Administration, Washington, DC (1984)..... 6, 15

P. Zador, *Alcohol-Related Relative Risk of Fatal Driver Injuries in Relation to Driver Age and Sex*, Journal of Studies on Alcohol (in press 1989)..... 12

In The
Supreme Court of the United States

October Term 1989

No. 88-1897

Michigan Dept. of State Police and Col. R. T. Davis,
Director of the Michigan Dept. of State Police,
Petitioners,

v.

Rick Sitz, Joseph F. Young, Sr., Dominic J. Jacobetti,
Dick Allen, Keith Muxlow, and Jack Welborn,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF OF AMICI CURIAE INSURANCE INSTITUTE FOR HIGHWAY SAFETY THE ALLIANCE OF AMERICAN INSURERS ALLSTATE INSURANCE COMPANY THE AMERICAN INSURANCE ASSOCIATION AMICA MUTUAL INSURANCE COMPANY FARMERS INSURANCE GROUP OF COMPANIES GEICO GROUP OF COMPANIES HARTFORD FIRE INSURANCE COMPANY LIBERTY MUTUAL GROUP LUMBERMENS MUTUAL CASUALTY COMPANY NATIONAL ASSOCIATION OF INDEPENDENT INSURERS NATIONWIDE MUTUAL INSURANCE COMPANY PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY THE TRAVELERS INDEMNITY COMPANY UNITED SERVICES AUTOMOBILE ASSOCIATION

In Support of Petitioners

INTERESTS OF AMICI CURIAE

The Insurance Institute for Highway Safety (the Institute) is a nonprofit research and communications organization, supported by the nation's property and casualty insurers, that identifies ways to reduce motor vehicle crashes and crash losses. One of the most important of the human factors contributing to highway deaths and injuries is alcohol-impaired driving. The Institute has supported seminal work on deterring the alcohol-impaired driver, including research at sobriety checkpoints, and has evaluated public opinion concerning such checkpoints.

Year after year motor vehicle crash deaths and injuries remain one of the most significant public health problems facing this country. Alcohol-impaired driving is one of the major factors contributing to serious motor vehicle crashes. The individual insurance companies and the insurance trade associations joining on this brief have a strong humanitarian as well as economic interest in reducing the carnage caused by alcohol-impaired driving. Accordingly, they support Petitioners in seeking reversal of the judgment below.

SUMMARY OF ARGUMENT

Alcohol-impaired driving is a serious public health problem that is resistant to simplistic solutions. One important means of reducing the incidence of alcohol-impaired driving is effective enforcement of alcohol-related traffic laws, which in turn deters potential offenders.

Studies show that the effectiveness of deterrence depends largely on the public perception that the risk of arrest is high. Sobriety checkpoints are minimally intrusive efforts that measurably increase the public's perception of the risk of apprehension for alcohol-impaired driving. At the same time, they can increase the actual risk of arrest. The Michigan Court of Appeals' holding that sobriety checkpoints do not generate a sufficient number of arrests to justify their use is contrary to the findings of research evaluating state implementation of such checkpoints.

The Fourth Amendment should not be construed to prevent police from using sobriety checkpoints as part of a state's enforcement program to apprehend and deter the alcohol-impaired driver.

ARGUMENT

I. ALCOHOL-IMPAIRED DRIVING IS A SERIOUS, WIDESPREAD CRIME THAT CAN BE DETERRED BY HIGHLY VISIBLE ENFORCEMENT PROGRAMS.

In 1986, three percent of a national sample of passenger vehicle drivers on weekend nights had blood alcohol concentrations (BAC) at or above 0.10 percent,[1] the level at which 46 states and the District of Columbia consider driving ability so impaired as to constitute a criminal offense.[2] These drivers represented 12 percent of all drinking drivers on weekend nights but 86 percent of the fatally injured drinking drivers.[3]

Alcohol impairment begins at low BACs and rises sharply as BACs increase.[4] Crash probability rises rapidly after 0.08 percent. At 0.15 percent, drivers are more than 50 times more

---

[1] A. K. Lund and A. C. Wolfe, *Changes in the Incidence of Alcohol-Impaired Driving in the United States*, 1973-1986, Journal of Studies on Alcohol (in press 1989); Insurance Institute for Highway Safety, *1989 Alcohol Fact Sheet*, Arlington, VA.

[2] California, Oregon and Utah have established 0.08 percent BAC as the level at which it is illegal to operate a motor vehicle. In Georgia, it is 0.12 percent BAC. CAL. [Veh.] CODE § 23152(b) (Deering), as amended by 1989 Cal. Adv. Legis. Serv. Ch. 479 (Deering); OR. REV. STAT. § 813.010(1)(a) (1987); UTAH CODE ANN. § 41-6-44(1)(a) (1988); GA. CODE ANN. § 40-6-39(a)(4) (1987 Supp.).

[3] *Supra* note 1.

[4] H. Moskowitz, M. M. Burns, A. F. Williams, *Skills Performance at Low Blood Alcohol Levels*, 46 Journal of Studies on Alcohol 482 (1985).

likely to be involved in a fatal crash than drivers with BACs less than 0.02 percent. Drivers with BACs above 0.15 percent as a group are more than 380 times more likely to killed in a single vehicle crash on a weekend night than are nonimpaired drivers.[5]

There are no simple solutions to the problem of alcohol-impaired driving.[6] Alcohol is a legal drug that is widely used and easily obtained. The private motor vehicle has become the predominant mode of transportation in the United States. Some driving after alcohol consumption is inevitable.[7] The challenge to state highway officials is to reduce driving by those who are seriously impaired.

Survey data on the BACs of nighttime drivers show that alcohol-impaired driving is a pervasive crime.[8] Because it is impossible to arrest more than a relatively small proportion of offenders, deterrence is critical to efforts to reduce the problem of alcohol-impaired driving.[9] States are implementing a wide

[5] P. Zador, *Alcohol-Related Relative Risk of Fatal Driver Injuries in Relation to Driver Age and Sex*, Journal of Studies on Alcohol (in press 1989); *supra* note 1.

[6] Presidential Commission on Drunk Driving, *Final Report*, Washington, DC (1983). The Commission cautioned that no single element of the comprehensive program it outlined would have a lasting impact on the problem of alcohol-impaired driving. "[A] coordinated, decade-long commitment to a multifaceted approach must be taken by every State and community." The Commission recommended sobriety checkpoints as part of a law enforcement effort to apprehend and deter alcohol-impaired drivers.

[7] In 1986, a national sample of passenger vehicle drivers on weekend nights revealed that 26 percent had been drinking. Lund and Wolfe, *supra* note 1.

[8] *Supra* note 1.

[9] The Presidential Commission on Drunk Driving listed six key elements to combat alcohol-impaired driving. The fourth element described the legal component: "[I]n order to ensure that our laws play their proper role in discouraging the largest possible number of potential drunk drivers, States and localities should take a *general deterrence approach* in developing short-term remedies to the problem, with the focus on increasing the perception of risk of arrest." (Emphasis in original.) *Supra* note 6.

range of countermeasures using existing social, political, and educational means to persuade the public that alcohol-impaired driving should be socially unacceptable. Efforts such as laws raising the minimum drinking age to 21[10] have targeted specific subgroups. Laws against alcohol-impaired driving, however, are the foundation of all efforts to combat the problem.

The mere existence of these laws is not enough to deter the alcohol-impaired driver. The standard model of deterrence has three elements: a perception of the likelihood of detection and arrest;[11] the speed and certainty of punishment after arrest; and the severity of punishment.[12] Of the three elements, by far the most important is the public's perception of the risk of arrest. Where that is low, deterrent efforts inevitably fail, regardless of the severity of punishment for those few offenders who are apprehended.

II. CHECKPOINTS ARE EFFECTIVE IN DETERRING ALCOHOL-IMPAIRED DRIVING.

A. Sobriety Checkpoints Increase the Public's Perceived Risk of Arrest.

A 1984 Institute study published by the National Highway Traffic Safety Administration demonstrated that sobriety checkpoints and accompanying publicity are effective in increasing the public's awareness of the risk of being

[10] This Court recently upheld Congress' effort to reduce the alcohol-impaired driving problem among teenagers by encouraging states to adopt 21 as the minimum national drinking age. *South Dakota* v. *Dole*, 483 U.S. 203 (1987), upholding 23 U.S.C. § 158.

[11] Estimates of the actual risk of being arrested for alcohol-impaired driving vary from one in 200 to one in 2,000. R. K. Jones and K. B. Joscelyn, *Alcohol and Highway Safety 1978: A Review of the State of Knowledge*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Washington, DC (1978); *Presidential Commission*, *supra* note 6.

[12] H. L. Ross, *Deterring the Drinking Driver: Legal Policy and Social Control*, Lexington Books, D. C. Heath and Co., Lexington, MA (1981).

apprehended for alcohol-related driving offenses.[13] The Institute compared public perceptions of the risk of being arrested for alcohol-impaired driving in two jurisdictions: Fairfax County, Virginia, which has a long history of serious enforcement and relatively high arrest rates and, Montgomery County, Maryland, a geographically and demographically similar jurisdiction with historically lower arrest rates. During the study period Montgomery County used well publicized sobriety checkpoints in its enforcement program, while Fairfax County relied on drinking-driver patrols that had little or no associated publicity.

Telephone surveys of licensed drivers over 18 years old revealed that public awareness of enforcement programs was far greater in Montgomery County than in Fairfax County, even though Montgomery County's arrest rate had been lower than Fairfax County's in all but the most recent year. Respondents from *both* counties incorrectly believed that the probability of arrest was higher in Montgomery County than in Fairfax County.[14]

Similarly, analysis of an enforcement program in British Columbia, Canada, illustrates both the effectiveness of sobriety checkpoints, in combination with publicity, and the potentially misleading nature of arrest rate statistics.[15] That study found that arrest rates and numbers of drivers passing through checkpoints were unrelated but that alcohol-related crashes declined with increased checkpoint activity and publicity. Arrest rates, in contrast, tended to go up when alcohol-related crashes were more frequent and to decline when crashes declined; thus

---

[13] A. F. Williams and A. K. Lund, *Deterrent Effects of Roadblocks on Drinking and Driving*, 3 Traffic Safety Evaluation Research Review 7, U.S. Department of Transportation, National Highway Traffic Safety Administration, Washington, DC (1984).

[14] *Id.* at 13-14.

[15] G. W. Mercer, *The Relationships Among Driving While Impaired Charges, Police Drinking Driving Roadcheck Activity, Media Coverage and Alcohol-Related Casualty Traffic Accidents*, 17 Accident Analysis and Prevention 467 (1985).

arrest rates did not reflect the deterrent effects of checkpoint activity. The study also underlined the importance of media coverage of enforcement activities, as one checkpoint blitz held during a period of newspaper strikes failed to generate news stories and also failed to reduce alcohol-related crashes.

These studies show that in contrast to traditional patrol procedures, sobriety checkpoints are a highly visible means of enforcing alcohol-impaired driving laws that appreciably increase the public's perception of the risk of arrest. When that perception is low, a state reaps only a small general deterrent benefit from the extensive resources it devotes to its law enforcement, judicial, and administrative efforts to reduce the carnage caused by alcohol-impaired driving.

By concentrating its attention on the few offenders who are arrested in enforcement programs (through both sobriety checkpoints and traditional enforcement efforts), the courts below overlooked the advantage sobriety checkpoints have over traditional methods in deterring alcohol-impaired driving; they reach vastly greater numbers of people.[16] Every time police conduct a sobriety checkpoint, they come in direct contact with hundreds of drivers who either pass through the checkpoint or pass the checkpoint going in the opposite direction. There can be no mistaking a properly conducted sobriety checkpoint for

---

[16] In Charlottesville, Virginia, sobriety checkpoint operations were used extensively from December 30, 1983 until December 31, 1984. During this period, 23,615 vehicles were stopped at the checkpoints. Assuming that a large number of these vehicles carried more than one occupant, thousands more people passed through the checkpoints and a similarly large number passed the checkpoints going in the opposite direction. R. B. Voas, A. E. Rhodenizer, and C. Lynn, *Evaluation of Charlottesville Checkpoint Operation: Final Report*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Washington, DC (1985).

This evaluation is the most comprehensive study of the use of sobriety checkpoints in the reported literature. Although it was available prior to the trial of this case, the court did not have the benefit of its findings.

anything other than an enforcement effort aimed at alcohol-impaired driving.[17]

In contrast, when police stop an individual on suspicion of alcohol-impaired driving, passers-by have no reason to associate that stop with a specific enforcement program. Checkpoints by their very nature increase public awareness of the problem of alcohol-impaired driving, the possibility of an arrest, and the presence of an active enforcement program.

The Presidential Commission on Drunk Driving noted in its *Final Report* that on average, a uniformed officer makes only two arrests for alcohol-impaired driving each year.[18] The Commission recommended the use of sobriety checkpoints to raise the actual and the perceived risk of arrest.[19]

In short, the studies show that one of the principal advantages of sobriety checkpoints is their effectiveness as a deterrent. The courts below, by concentrating only on the number of arrests, unfairly focused on the wrong question during their balancing analysis.

B. Checkpoints In Fact Deter Alcohol-Impaired Drivers.

i. Widely publicized sobriety checkpoints affect drinkers' decisions regarding driving.

As part of the evaluation of the year-long sobriety checkpoint program in Charlottesville, Virginia, researchers

---

[17] For safety reasons and to prevent the public from being unduly surprised or concerned about checkpoints, sobriety checkpoint guidelines require police to place conspicuous signs identifying sobriety checkpoints well ahead of the stopping areas. U.S. Department of Transportation, National Highway Traffic Safety Administration, *The Use of Safety Checkpoints for DWI Enforcement*, DOT HS 806-476, 13, Washington, DC (1983).

[18] Presidential Commission, *supra* note 6.

[19] "Recommendation--Selective Enforcement and Road Blocks. Police agencies should apply selective enforcement and other innovative techniques, including the use of preliminary breath testing devices and judicially approved roadblocks, to achieve a high perception of risk of detection for driving under the influence." Presidential Commission, *supra* note 6.

surveyed a representative sample of the local drinking establishments.[20] They interviewed managers and employees to obtain objective evidence of the public's response to the checkpoints. Eighty-five percent of the alcohol servers interviewed reported hearing customers discussing checkpoints.[21] Only 20 percent noted no change in patron drinking during the period that checkpoints were being conducted.[22] Sixty-five percent reported some customers were drinking less;[23] two out of three reported that patrons were increasing the use of designated drivers (patrons who agreed to drive drinking patrons and agreed to limit their own alcohol consumption or drink only non-alcoholic beverages).[24]

ii. Arrest rates are high but intrusion is low at sobriety checkpoints.

Although arrest rates should not be used as the only appropriate measure of the effectiveness of efforts to deter alcohol-impaired driving, they are an important component of a comprehensive program.[25] Properly conducted sobriety checkpoints can achieve significantly higher arrest rates than other enforcement methods.[26]

By comparing the number of alcohol-impaired drivers arrested to the number of all drivers passing through the checkpoints, the courts below seriously underestimated the arrest

---

[20] Voas, *supra* note 16, at 35-37.

[21] *Id.* at 35.

[22] *Id.* at 36.

[23] *Id.*

[24] *Id.* at 37.

[25] Ross, *supra* note 11.

[26] R. B. Voas, *Enforcement Productivity and Impact: Checkpoints vs. Traditional Patrols*, Presented at the 11th International Conference on Alcohol, Drugs, and Traffic Safety, Chicago, IL (October 27, 1989); Voas, *supra* note 16, at 8.

rate achieved at the Saginaw, Michigan, sobriety checkpoint. The pertinent arrest rate is the rate for the number of alcohol-impaired drivers passing through the checkpoint. As shown above, three percent of weekend nighttime drivers have BACs at or above 0.10 percent.[27] The Charlottesville study shows one to two percent of the drivers passing through checkpoints are arrested for alcohol-impaired driving, and that is comparable to the rate experienced in Saginaw County.[28] A one to two percent arrest rate means that about one-third to two-thirds of alcohol-impaired drivers passing through checkpoints are being arrested. This is at least the equivalent of the arrest rate for traditional patrols.[29]

Arrest rates from sobriety checkpoints compare favorably to patrols by a second measure, the number of arrests per police manhour.[30] In the Charlottesville program, police achieved a higher arrest rate at the checkpoints than from patrols and the number of officer hours per arrest at checkpoints (6.5) was 20 percent lower than for patrols (7.9).[31]

This increased efficiency is achieved at a cost of only a minimal intrusion on individuals' time. The period drivers come in contact with police at checkpoints is typically short, averaging

---

[27] *Supra* note 1.

[28] In Charlottesville, 1.2 percent of the drivers examined were arrested and an additional 1.6 percent were given "Advisories." These drivers had been drinking but their BACs were between 0.05 and 0.10 percent. Voas, *supra* note 16, at 4.

[29] Police commonly fail to identify alcohol-impairment in the drivers they stop. The ability of police to correctly identify alcohol-impaired drivers varies greatly. A. K. Lund and I. S. Jones, *Detection of Impaired Drivers with a Passive Alcohol Sensor*, Proceedings of the 10th International Conference on Alcohol, Drugs, and Traffic Safety, September 10, 1986, T-86, Elsevier Science Publishers B.V., Biomedical Division, Amsterdam (1987); M. R. Pagano and S. P. Taylor, *Police Perceptions of Alcohol Intoxication*, 10 J. of Applied Social Psychology 166 (1980).

[30] Voas, supra note 16.

[31] *Id.* at 8.

less than a minute in Charlottesville and just about 25 seconds at the checkpoint at issue here.[32]

In deciding whether sobriety checkpoints are facially unconstitutional, consideration should also be given to the means available to reduce the intrusion even further. Passive alcohol sensors, which provide officers with a scientifically valid and objective measure of the presence of alcohol in a driver's exhaled breath,[33] can improve the overall efficiency of the checkpoint.

Passive alcohol sensors used at some of the Charlottesville checkpoints increased both the number of drivers an officer could evaluate for alcohol impairment in a given time and the reliability of the evaluations. The checkpoint arrest rate for drivers with BACs at or above 0.10 percent increased from 45 to 68 percent when officers used the passive sensors.[34] Officers using the sensors correctly identified 80 percent more drivers with BAC's over 0.05 percent than they did at similar checkpoints working without the sensor.[35] The sensors also helped officers to more effectively identify nondrinking drivers

---

[32] *Id.* at 4.

[33] Passive alcohol sensors have been developed to provide a reliable supplement to the officer's observations of drivers being investigated for possible alcohol-impairment. The passive sensors, when positioned in front of a driver's mouth, detect alcohol in the driver's exhaled breath. Models vary according to the detail of the readings they supply, but in general they provide an objective indicator of whether impairment testing is appropriate. An officer uses the sensor when the driver is speaking, usually answering the routine questions asked during a traffic stop or at a sobriety checkpoint. It is only necessary that the driver be speaking for the sensor to get optimum results; if the driver is not speaking, any result will underestimate either the presence or amount of alcohol, thus favoring the driver. M. Fields and A. R. Hricko, *Passive Alcohol Sensors--Constitutional Implications*, 20 The Prosecutor 45 (1986).

[34] I. S. Jones and A. K. Lund, *Detection of Drunk Drivers Using a Passive Sensor*, 14 Journal of Police Science and Administration 153 (1986); Voas, *supra* note 16, at 9.

[35] *Id.*, Jones and Lund.

and drivers with low BACs who did not need to be detained for investigation.

iii. Sobriety checkpoints raise the probability of arrest.

Traditional patrols do not put all alcohol-impaired drivers at risk of arrest. Alcohol-impaired drivers who, under nondemanding driving conditions, may not convey the appearance of impaired driving and alcohol-impaired drivers whose driving is erratic but unobserved by police patrols are not arrested. They only come to the attention of law enforcement officers if they are involved in a crash. Such drivers are at much greater risk of arrest at checkpoints.[36]

Young alcohol-impaired drivers, a subgroup of drinking drivers who are at greater risk of a crash,[37] are less likely to be arrested than older drivers even when they are at high BACs.[38] But the proportion of young drivers arrested at checkpoints is more reflective of their proportion in crashes than the proportion apprehended through other enforcement measures.[39]

Sobriety checkpoints extend the reach of enforcement to otherwise undetected offenders, enabling the state to use its resources against alcohol-impaired driving more effectively.

---

[36] Not surprisingly, the average BAC of those arrested at checkpoints is lower than that of those arrested by patrols. It is likely that as BACs increase, an alcohol-impaired driver's ability to avoid erratic driving decreases. Voas, *supra* note 16, at 15-16.

[37] R. S. Karpf and A. F. Williams, *Teenage Drivers and Motor Vehicle Deaths*, 15 Accident Analysis and Prevention 55 (1983); A. F. Williams and O. Carsten, *Driver Age and Crash Involvement*, 79 American Journal of Public Health 326 (1989); U.S. Department of Transportation, National Highway Traffic Safety Administration, *Alcohol Involvement Rates in Fatal Crashes: A Focus on Young Drivers and Female Drivers*, DOT HS 807-184, Washington, DC (1987).

[38] R. B. Voas and A. F. Williams, *Age Differences of Arrested and Crash-Involved Drinking Drivers*, 47 Journal of Studies on Alcohol 244 (1986).

[39] Voas, *supra* note 16, at 16-18; Voas, *supra* note 26.

iv. Sobriety checkpoints reduce the incidence of alcohol-related crashes.

Evaluations of checkpoint programs in Virginia, Florida, New Jersey, and in New South Wales, Australia, have demonstrated that checkpoints are effective.

In New Jersey, checkpoints, along with two educational programs, were associated with a drop of 10 to 15 percent in single-vehicle nighttime crashes (a commonly used measure of alcohol-impaired driving). Moreover, the effect was not temporary, but lasted for several years.[40] Similarly, the year-long checkpoint program in Charlottesville, Virginia, was associated with a 13 percent reduction in alcohol-related crashes.[41] Use of sobriety checkpoints was accompanied by both fewer police reports of alcohol-involvement in nighttime crashes and a lower incidence of nighttime crashes. Similar results were obtained under a checkpoint program in Clearwater and Largo, Florida, which experienced a 12 percent reduction in alcohol-related crashes following checkpoint operations.[42]

The most dramatic results were reported in New South Wales, Australia, where alcohol-related fatal crashes dropped by an estimated 30 percent following introduction of widespread driver testing[43] and have remained low for four to five years.

---

[40] D. Levy, D. Shea, P. Asch, *Traffic Safety Effects of Sobriety Checkpoints and Other Local DWI Programs in New Jersey*, 79 American Journal of Public Health 291 (1989).

[41] Voas, *supra* note 16, at 40-42, 46.

[42] J. Lacey, *Enforcement and Public Information Strategies for DWI General Deterrence: The Clearwater and Largo, FL Experience*, U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT HS 807-066, Washington, DC (1986).

[43] R. Homel, D. Carseldine, and I. Kearns, *Drink-Drive Countermeasures in Australia*, 4 Alcohol, Drugs and Driving 113 (1988). Australian results cannot be fully attributed to checkpoint operations because Australian police are permitted to randomly stop individual drivers to check for alcohol-impairment. Such stops are widely utilized in addition to sobriety checkpoints. Consequently, a third of the driver population is subjected to random breath testing each year. The Australian experience, however, strongly demonstrates

III. THE CONSTITUTION DOES NOT BAR STATES FROM USING CHECKPOINTS IN THEIR ENFORCEMENT PROGRAMS.

A. Sobriety Checkpoints Result in Minimal Inconvenience to the Public.

The checkpoint guidelines at issue are designed to assure that the inconvenience to the public is minimized.[44] Generally, such guidelines provide that checkpoint sites should be carefully chosen with a view to safety as well as arrest rates.[45] Proper checkpoint procedures allow for vehicles to be chosen randomly so that there are not long delays. For example, when heavy traffic threatens delays, police can apply a prescribed formula for choosing which drivers to stop, such as every fifth driver passing through the checkpoint.[46]

---

the deterrent value of widespread, visible enforcement efforts in which police are able to evaluate drivers for alcohol-impairment.

Sobriety checkpoints in the United States could not be expected to achieve as great an effect as the Australian program. However, the Australian experience suggests that sobriety checkpoints should have a beneficial effect on reducing the incidence of alcohol-related crashes in the United States.

[44] A stated goal of the guidelines used by the police in this case was to conduct checkpoints "with a minimal amount of intrusion or motorist inconvenience." Petition for Writ of Certiorari, Guidelines, 146a.

[45] Locations for sobriety checkpoints are chosen according to criteria such as incidence of alcohol-related fatalities, nighttime injuries or nighttime single vehicle crashes.

The visibility of the checkpoint site to approaching drivers as well as the availability of space where drivers who require more than a cursory investigation can be directed are important safety factors that are taken into consideration in choosing checkpoint locations. U.S. Department of Transportation, *The Use of Safety Checkpoints for DWI Enforcement*, *supra* note 17, at 12.

[46] *Id.*

B. The Public Approves of Sobriety Checkpoints.

The lower courts agreed that sobriety checkpoints were not an objectively unreasonable intrusion because the public experienced only a short delay. But their finding of significant subjective intrusion is not consistent with research evidence. Surveys show widespread public support for sobriety checkpoints, not fear and surprise.

In a telephone survey to evaluate the Charlottesville, checkpoint program,[47] respondents were separated into two groups based on their answers to questions about their drinking and driving habits: those who were "at risk" for alcohol-impaired driving and those who were "not at risk." Eighty-seven percent of the "at risk" respondents either approved or strongly approved of the checkpoint operations,[48] as did 78 percent of a corresponding group from the comparison town, Blacksburg, Virginia, where checkpoints were not being used.[49] Of the "not at risk" respondents, 90 percent in Charlottesville and 88 percent in Blacksburg either approved or strongly approved of the checkpoints.[50]

The Charlottesville and similar surveys show not only that the public strongly supports sobriety checkpoints, but that checkpoints could be used regularly without eroding that support. Indeed, support is stronger where checkpoints have

---

[47] Voas, *supra* note 16, at 19-34.

[48] *Id.* at 31.

[49] *Id.*

[50] The Charlottesville survey is consistent with an earlier Institute survey showing widespread public approval in Montgomery County, Maryland and in Delaware, which were using checkpoints, as well as in Fairfax County, Virginia and Maryland's Eastern Shore, comparison communities which were not using them. Eighty-five percent of the Montgomery County respondents thought "police should routinely set up roadblocks to detect drunk drivers." In Fairfax County, 79 percent of those surveyed supported sobriety checkpoints. Similarly, 86 percent of the Delaware respondents and 74 percent of the Maryland Eastern Shore respondents approved of checkpoints. Williams and Lund, *supra* note 13.

been used, suggesting that increased familiarity leads to increased support.[51]

In contrast to these objective studies, the courts below merely speculated about the public's fear of checkpoints.

The Institute submits that for checkpoints, the state's interest in arresting and deterring alcohol-impaired drivers is far greater than the interest in ensuring proper license and registration,[52] which this court found constitutionally acceptable in *Delaware* v. *Prouse*.[53]

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

Counsel of Record

MICHELE MCDOWELL FIELDS
ANDREW R. HRICKO
STEPHEN L. OESCH

---

[51] Voas, *supra* note 16, at 31.

[52] Not only is alcohol-impaired driving a more immediate hazard to the public than unlicensed driving, there is evidence that drivers whose licenses have been suspended or revoked drive more carefully and less frequently as a result of their unlicensed status. R. C. Peck, D. D. Sadler, and M. W. Perrine, *The Comparative Effectiveness of Alcohol Rehabilitation and Licensing Control Actions for Drunk Driving Offenders: A Review of the Literature*, 1 Alcohol, Drugs,and Driving: Abstracts and Reviews 15 (1985).

Furthermore, unlicensed drivers and drivers whose licenses have been suspended or revoked are identified at sobriety checkpoints as well as alcohol-impaired drivers. The Charlottesville checkpoints generated more than 200 citations for license and vehicle registration violations. Voas, *supra* note 16, at 6.

[53] 440 U.S. 648 (1979).

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 1989, I served the foregoing Motion for Leave to File a Brief Amici Curiae and Brief of Amici Curiae upon the parties by first class mail, postage prepaid to:

Mark Granzotto, Esquire
One Kennedy Square
Suite 2204
Detroit, Michigan 48226

Louis J. Caruso, Esquire
Solicitor General of Michigan
525 West Ottawa Street
Suite 753
Lansing, Michigan 48913

ANDREW R. HRICKO

MOTION FILED
NOV 15 1989

No. 88-1897

In The

Supreme Court of the United States

October Term, 1989

DEPARTMENT OF STATE POLICE and
GERALD L. HOUGH, Director of the Michigan
Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW, and JACK WELBORN,

Respondents.

On Writ Of Certiorari To The
Supreme Court For The State Of Michigan

BRIEF OF AMICUS CURIAE NATIONAL ORGANIZATION OF MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF PETITIONERS

Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201
(214) 939-5500

David Bryant
Eric R. Cromartie

Counsel for National Organization of Mothers Against Drunk Driving

No. 88-1897

In The

Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF STATE POLICE AND
GERALD L. HOUGH, DIRECTOR OF THE MICHIGAN
DEPARTMENT OF STATE POLICE,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW, AND JACK WELBORN,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Organization of Mothers Against Drunk Driving ("MADD") respectfully moves this Court for leave to file the accompaning Brief in this case as *amicus curiae*. The consent of the attorney for the Petitioners has been obtained and is on file with the Court, but the attorney for the Respondents has not consented to the filing of a brief by MADD as *amicus curiae*.

The applicant, MADD, has an interest in this case in that one of the primary reasons for the existence of MADD is to eliminate alcohol-impaired driving. This case is of critical importance to the achievement of that goal, in that it raises the issue of the constitutionality of a program of sobriety checkpoints carefully designed to minimize on-the-scene officer discretion and to comply with this Court's past decisions. MADD believes that such programs are the single most effective tool for protecting the public from drunk drivers, and should be upheld as reasonable and consistent with the Fourth Amendment to the United States Constitution.

The Petitioners herein, as well as Respondents, the trial court, and the Michigan Court of Appeals, agreed that the "correct test to be used to determine the constitutionality of the sobriety checkpoint plan" was the "three-prong balancing test" set forth in *Brown v. Texas*, 443 U.S. 47, 50-51 (1979). *Sitz v. Department of State Police*, 429 N.W2d 180, 182 (Mich. App. 1988). MADD believes that this standard is not applicable, and has been misapplied by the lower courts in any event. The proposed Brief sets forth what MADD believes to be the correct legal standard and burden of proof, and the appropriate application of that standard in light of the substantial published evidence relevant to the issues presented. If MADD's arguments are accepted by this Court, the decision of the court below must be reversed.

WHEREFORE, the National Organization of Mothers Against Drunk Driving respectfully requests that this motion be granted, and that leave be given to file the proposed Brief as *Amicus Curiae* in this cause.

Respectfully submitted,

HUGHES & LUCE

BY: _____
DAVID BRYANT
ERIC R. CROMARTIE

2800 Momentum Place
1717 Main Street
Dallas, Texas 75201
(214) 939-5500

Attorneys for National Organization of Mothers Against Drunk Drivers

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys or record of all parties to the above cause in accordance with Rule 28, Supreme Court Rules, on this 15th day of November, 1989.

_____

No. 88-1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF STATE POLICE AND
GERALD L. HOUGH, DIRECTOR OF THE MICHIGAN
DEPARTMENT OF STATE POLICE,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW, AND JACK WELBORN,

Respondents.

On Writ Of Certiorari To The
Supreme Court For The State Of Michigan

BRIEF OF AMICUS CURIAE NATIONAL ORGANIZATION OF MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF PETITIONERS

HUGHES & LUCE
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201
(214) 939-5500

DAVID BRYANT
ERIC R. CROMARTIE

Counsel for National
Organization of Mothers
Against Drunk Driving

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
THE INTEREST OF AMICUS CURIAE	1
SUMMARY OF FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE TRIAL COURT IMPROPERLY PLACED ON THE STATE POLICE THE BURDEN OF DEMONSTRATING THE CONSTITUTIONALITY OF THE SOBRIETY CHECKPOINT PROGRAM	6
II. THE LOWER COURTS ERRONEOUSLY APPLIED *BROWN V. TEXAS*	8
A. The Existence of a Strong State Interest in Combatting Drunk Driving, Combined with Guidelines Strictly Confining the Discretion of the On-The-Scene Officer, is Sufficient to Establish the Constitutionality of Sobriety Checkpoints in Michigan	8
B. Proper Application of the Balancing Test in *Brown v. Texas* Establishes the Validity of the Michigan Checkpoint Program	12
C. The Trial Court Erroneously Required the State Police to Prove that Sobriety Checkpoints are More "Effective" Than any Less Intrusive Law Enforcement Technique	14
D. The Evidence Presented to the Trial Court was Insufficient to Support the Invalidation of Sobriety Checkpoints in Michigan	16
E. The Trial Court Incorrectly Focused on Arrest Numbers as the Measure of the Effectiveness of Sobriety Checkpoints	19
F. The Trial Court Ignored Evidence from Reported Cases that Supported the Use of Sobriety Checkpoints	21

	Page
III. CURRENTLY AVAILABLE PUBLISHED EVIDENCE DEMONSTRATES THE EFFECTIVENESS OF SOBRIETY CHECKPOINT PROGRAMS	23
CONCLUSION	29
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

Cases	Pages
Alderman v. United States, 394 U.S. 165 (1969)	7
Barrows v. Jackson, 346 U.S. 249 (1953)	8
Bell v. Wolfish, 441 U.S. 520 (1979)	20
Brown v. Texas, 443 U.S. 47 (1979)	3, 4, 10, 11, 12, 13
Cady v. Dombrowski, 413 U.S. 433 (1973)	16
Camara v. Municipal Court, 387 U.S. 523 (1967)	20
Commonwealth v. McGeoghegan, 449 N.E.2d 349 (Mass. 1983)	7
Commonwealth v. Shields, 521 N.E.2d 987 (Mass. 1988)	15
Commonwealth v. Tarbert, 535 A.2d 1035 (Pa. 1987)	24
Commonwealth v. Trumble, 483 N.E.2d 1102 (Mass. 1985)	10
Delaware v. Prouse, 440 U.S. 648 (1979)	4, 9
Ex parte Virginia, 100 U.S. 339 (1880)	7
Ingersoll v. Palmer, 743 P.2d 1299 (Cal. 1987)	19, 21
Katz v. United States, 389 U.S. 347 (1967)	13
Kinslow v. Commonwealth, 660 S.W.2d 677 (Ky. App. 1983)	10
Little v. State, 479 A.2d 903 (Md. 1984)	21
Lowe v. Commonwealth, 337 S.E.2d 273 (Va. 1986)	10
McDonald v. Board of Election, 394 U.S. 802 (1969)	7
National Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railway Company, 470 U.S. 451 (1985)	7
National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989)	11, 20
People v. Scott, 473 N.E.2d 1 (N.Y. 1984)	21, 23
Sitz v. Department of State Police, 170 Mich. App. 433, 429 N.W.2d 180 (1988), *appeal denied*, 432 Mich. 879 (1989)	4

Cases	Pages
Skinner v. Railway Labor Executives Association, 109 S.Ct. 1402 (1989)	11
South Dakota v. Opperman, 428 U.S. 364 (1976)	13
State v. Garcia, 481 N.E.2d 148 (Ind. App. 1985)	10
State v. Goins, 473 N.E.2d 1219 (Ohio App. 1984)	10
State v. Golden, 318 S.E.2d 693 (Ga. App. 1984)	10
State v. McLaughlin, 471 N.E.2d 1125 (Ind. App. 1984)	7
State v. Superior Court, 691 P.2d 1073 (Ariz. 1984)	21, 22
Texas v. Brown, 460 U.S. 730 (1983)	9, 10
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	8
United States v. Lee, 274 U.S. 559 (1927)	13
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	8, 20
United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989)	9
United States v. Salerno, 481 U.S. 739 (1987)	6
United States v. Sharpe, 470 U.S. 686 (1985)	15
Webb v. State, 695 S.W.2d 676 (Tex. Crim. App. 1985)	7

Other Authorities

Baker, "Roadside Sobriety Checkpoint Operations in the District of Columbia"	27
Beitel, Sharp and Glauz, "Probability of Arrest While Driving Under the Influence of Alcohol," *Journal of Studies of Alcohol* 36: 237-256 (1975)	24
Epperlein, "The Use of Sobriety Checkpoints as a Deterrent: An Impact Assessment," State of Arizona Analysis Center, Phoenix, AZ. (1985)	25
Hingson, "1987 Massachusetts/New Hampshire Road Block Surveys"	27
Homel, Carseldine and Kearns "Drink-drive Countermeasures in Australia." *Alcohol, Drugs and Driving* 113-144 (1988)	26

Cases	Pages
Lacey, *Enforcement and Public Information Strategies for DWI General Deterrence: The Clearwater and Largo, FL Experience*. Report DOR-HE-807-066, National Highway Traffic Safety Administration, Washington, D.C. (1986)	25
Levy, Shea and Asch, "A Further Assessment of DWI Programs in New Jersey." Office of Highway Safety, Trenton, N.J. (1987)	24
MCLA 257.715(2)	6
National Transportation Safety Board, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocation*. NTSB/55-84/01, Washington, D.C. (1984)	29
Presidential Commission on Drunk Driving *Final Report*. Available from the National Commission Against Drunk Driving, Washington, D.C. (1983)	28
Voas, Rhodenier and Lynn, *Evaluation of the Charlottesville Checkpoint Operations*. Report DOT-HS-806-989, National Highway Traffic Safety Administration, Washington, D.C. (1985)	24
Williams and Lund, "Deterrent Effects of Checkpoints on Drinking and Driving"	27
Wolfe, "Characteristics of Alcohol-Impaired Drivers"	23

No. 88-1897

In The

Supreme Court of the United States

October Term, 1989

DEPARTMENT OF STATE POLICE and
GERALD L. HOUGH, Director of the Michigan
Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW, AND JACK WELBORN,

Respondents.

BRIEF OF AMICUS CURIAE NATIONAL ORGANIZATION OF MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF PETITIONERS

THE INTEREST OF AMICUS CURIAE

Mothers Against Drunk Driving ("MADD") was founded in May, 1980. Its mission statement speaks for itself:

> Mothers Against Drunk Driving mobilizes victims and their allies to establish the public conviction that impaired driving is unacceptable and criminal, in order to promote corresponding public policies, programs and personal accountability.

MADD exists for two reasons: to eliminate alcohol-impaired driving and to help meet the needs of the victims of drunk driving crimes.

In pursuit of these goals, MADD has participated actively in public and private studies, legislative initiatives, and law enforcement programs aimed at reducing the incidence of alcohol-related highway tragedies. MADD's extensive experience has convinced it that one of the most important and effective weapons in the war against drunk driving is the use of carefully designed sobriety checkpoints. The program adopted by the State of Michigan, after many years of study and close attention to this Court's legal decisions, is one of the very best in the nation. The Trial Court's holding[1] that Michigan's checkpoint program is unconstitutional jeopardizes the validity of all sobriety checkpoints on a nationwide basis, and therefore MADD's efforts to end the needless carnage on our nation's highways.

SUMMARY OF FACTS

Michigan, like many other states, has worked throughout the 1980's to find effective tools to combat drunk driving. The Michigan Legislature in 1982 established a Drunk Driving Task Force, which recommended the implementation of sobriety checkpoints on public highways. Michigan's Governor in January, 1986, directed the Michigan Department of State Police to implement a sobriety checkpoint program. After careful study and consideration of the decisions of this Court, the State Police adopted specific and extensive guidelines to make sure that sobriety checkpoints were operated

[1] For ease of reference, MADD refers to the trial court and appellate opinions collectively as the "Trial Court" opinions. Specific page references are to the actual text of the trial court opinion, unless otherwise specified.

so as to minimize any intrusion upon law-abiding motorists and strictly limit officer discretion.

After these efforts, the State Police were ready to implement the program beginning on May 17, 1986. Before they could even do so, the Respondents sued them to enjoin the program, claiming that sobriety checkpoints would violate Respondents' Fourth Amendment rights. Respondents had not been stopped at any checkpoint, and alleged only that they are licensed Michigan drivers who "regularly travel throughout the state in their automobiles." Trial Court at 1.

The State Police operated a sobriety checkpoint at a single location at Dixie Highway and Gretchen Road in Saginaw County, Michigan, for approximately one hour and fifteen minutes on the night of May 17. One hundred and twenty-six vehicles passed through the checkpoint, with an average delay to motorists of twenty-five seconds or less. Two motorists were arrested for driving under the influence of alcohol.

The case was tried beginning twelve days later on May 29, 1986. After hearing evidence that alcohol contributes to twenty-five to fifty percent of motor vehicle deaths, the trial court held that Michigan had a "grave and legitimate state interest in curbing drunk driving." Trial Court at 26. It also found that the guidelines established to implement the program ensured that "on-the-scene officer's discretion relative to the operation of sobriety checkpoints will be minimal." Trial Court at 48.

The Trial Court nevertheless held that the State Police had not carried their burden of proving that the Michigan sobriety checkpoint program was the most "effective" means of combatting drunk driving, and found that such checkpoints had "the potential to generate fear and surprise" to motorists. The Trial Court therefore held that, under this Court's decision in *Brown v. Texas*, 443 U.S. 47 (1979), the entire Michigan sobriety checkpoint program violated the Fourth

Amendment and enjoined its operation. The Michigan Court of Appeals affirmed that judgment, and the Michigan Supreme Court denied further review. *Sitz v. Department of State Police*, 170 Mich. App. 433, 429 N.W.2d 180 (1988), *appeal denied*, 432 Mich. 879 (1989).

SUMMARY OF ARGUMENT

The Trial Court improperly placed the burden of demonstrating the constitutionality of the sobriety checkpoint program on the Michigan Department of State Police ("State Police"). In evaluating the constitutionality of the sobriety checkpoint program, the Trial Court also incorrectly applied the three-pronged balancing test from *Brown v. Texas*, 443 U.S. 47 (1979). The appropriate standard for checkpoints is a two-part balancing test developed by those courts following this Court's decision in *Delaware v. Prouse*, 440 U.S. 648 (1979). That test weighs the state interest in conducting the limited checkpoint stop against the intrusion on individual liberty interests, where that intrusion is measured primarily by the amount of discretion exercised by the law enforcement officers operating the checkpoint. Because the Trial Court found that the state interest was strong and that officer discretion was minimal, application of the appropriate standard required that the Michigan program be upheld.

Alternatively, even if the test set forth in *Brown v. Texas* were applicable, the Trial Court misconstrued and misapplied that standard. The Trial Court erred in requiring the State Police to carry the burden of proving each and every element of the three-part "balancing test" articulated in *Brown v. Texas*. The Trial Court also improperly required the State Police to demonstrate through conclusive statistical evidence that the sobriety checkpoints were the single most effective law enforcement technique available.

The Trial Court further erred in invalidating the sobriety checkpoint program prematurely, and on the basis of an insufficiently developed factual record. Because the Michigan checkpoint program was in operation at only a single location for a total of one hour and fifteen minutes, the Trial Court had almost no experience with the actual operation of sobriety checkpoints in Michigan. Certainly, that experience was insufficient to justify the Trial Court's factual conclusions regarding the effectiveness or deterrent impact in Michigan of sobriety checkpoints operated accordingly to the specific guidelines of the Michigan program. Moreover, the Trial Court had no evidence whatsoever on which to base its conclusions regarding the "subjective fear and surprise" allegedly experienced by drivers at the checkpoint.

Finally, the Trial Court erred in relying heavily on the number of arrests as a key indicator of the effectiveness of sobriety checkpoint programs, and did not consider the substantial published evidence confirming the effectiveness of such programs. Published studies show that sobriety checkpoints are effective short-term and long-term methods for reducing the number of alcohol-related crashes (the ultimate goal of any DWI enforcement program). Similarly, studies have shown that sobriety checkpoint programs are perceived by the driving public as the most effective deterrent to drunk driving and that the use of such checkpoints is overwhelmingly supported by the public.

The Trial Court's substitution of its own views for the conclusions of the Michigan executive officials and the public on the relative effectiveness of sobriety checkpoints, as compared with other potential public safety policy choices, exceeded the appropriate role of the judiciary. Accordingly, the Trial Court's judgment should be reversed and the Michigan sobriety checkpoint program upheld.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY PLACED ON THE STATE POLICE THE BURDEN OF DEMONSTRATING THE CONSTITUTIONALITY OF THE SOBRIETY CHECKPOINT PROGRAM.

The explicit effect of the Trial Court's holding was to enjoin the State Police from *ever* implementing a sobriety checkpoint program in the State of Michigan. Inherent in the Trial Court's ruling was a finding that the Michigan statute specifically permitting "temporary vehicle check lanes at appropriate locations throughout the state" to check for violations of law governing the use of public highways, MCLA 257.715(2), was unconstitutional on its face. The Trial Court's holding rested not on the specific guidelines promulgated by the State Police or on the circumstances of any individual "seizure," but instead on its sweeping conclusion that sobriety checkpoints have only a "minimal degree of effectiveness in curbing drunk driving." Trial Court at 53.

The Trial Court specifically held that the State Police had the burden of proving that the sobriety checkpoint program satisfied the Fourth Amendment by demonstrating:

> a) a legitimate state interest, b) that the checkpoints substantially furthered that interest; and c) that both the objective and subjective intrusion on an individual's liberty interest was minimal.

Id. at 52. The Trial Court's placement of the burden of proof upon the State Police thereby ignored the heavy presumption of validity assigned to any legislative act. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be

valid.") (challenge to Bail Reform Act); *National Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railway Company*, 470 U.S. 451, 472 (1985) ("party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature acted in an arbitrary and irrational way.") Similarly, the actions of law enforcement officials are accompanied by a presumption of validity until and unless shown otherwise. *See, e.g., McDonald v. Board of Election*, 394 U.S. 802, 808-09 (1969); *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880).

The cases cited by the Trial Court[2] to support its imposition of the burden of proof on the State Police simply do not apply here. Each of those cases involved defendants who had been arrested at a sobriety checkpoint. Evidence derived from a search was to be used against them in a criminal prosecution. Respondents here are in no such jeopardy.

Not one of those opinions purported to find an entire state program of sobriety checkpoints invalid. MADD concedes that the state generally must show that evidence introduced against a defendant in a criminal prosecution was obtained lawfully. In order to have standing to challenge a particular search or seizure under the Fourth Amendment, however, an individual must have experienced the search or seizure at issue. *Alderman v. United States*, 394 U.S. 165, 171-174 (1969) ("Fourth Amendment rights are personal rights which, like

---

[2] *Commonwealth v. McGeoghegan*, 449 N.E.2d 349, 353 (Mass. 1983) (dismissal of complaints for DWI sustained because particular roadblock lacked sufficient police presence, lighting, and advance warning); *State v. McLaughlin*, 471 N.E.2d 1125, 1142 (Ind. App. 1984) (suppression of evidence as to defendant arrested at roadblock sustained, but court specifically emphasized that its ruling did not invalidate use of sobriety checkpoints generally); *Webb v. State*, 695 S.W.2d 676, 677-78 (Tex. Crim. App. 1985) (conviction of defendant reversed because particular license check roadblock was a subterfuge for DWI checks).

some other constitutional rights, may not be vicariously asserted.")

Respondents did not and could not challenge any specific search or seizure, since none of them had encountered the one sobriety checkpoint operated by the State Police for an hour and fifteen minutes.[3] Therefore, Respondents challenged only the general statutory authorization for the use of sobriety checkpoints. If they have any right at all to contest the statute's validity, they necessarily bear the "heavy burden of proof" of demonstrating that it is unconstitutional. *Salerno*, 481 U.S. at 745. The Trial Court clearly erred in improperly placing this burden on the State Police.

II. THE LOWER COURTS ERRONEOUSLY APPLIED BROWN V. TEXAS.

A. The Existence of a Strong State Interest in Combatting Drunk Driving, Combined with Guidelines Strictly Confining the Discretion of the On-The-Scene Officer, is Sufficient to Establish the Constitutionality of Sobriety Checkpoints in Michigan.

This Court has considered the constitutional validity of checkpoints on a number of occasions beginning with *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In that case, the Court upheld the constitutionality of checkpoints located near the border designed to apprehend illegal aliens. The Court distinguished such checkpoints from roving patrol car stops, *see United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), finding "the potential interference with legitimate traffic is

[3] Under *Barrows v. Jackson*, 346 U.S. 249, 255 (1953), "a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation." It therefore is doubtful that Respondents have standing to challenge the constitutionality of the Michigan sobriety checkpoints, either generally or as conducted in the limited model operation.

minimal . . . [and] checkpoint operations both appear to and actually involve less discretionary enforcement activity." 428 U.S. at 559. The Court concluded that the public interest in deterring violation of the immigration laws and the need for the use of checkpoints in that effort had been adequately demonstrated.

The checkpoint upheld in *Martinez-Fuerte* resulted in an apprehension rate of only .24 percent. *United States v. McFayden*, 865 F.2d 1306, 1313 (D.C. Cir. 1989). That is, of course, far less than the arrest rate in the limited actual experience with the Michigan sobriety checkpoint program (1.58 percent) or the reported experience with sobriety checkpoints in other states. Trial Court at 30-31. It was the "extremely low" arrest rate in Michigan, however, which the Trial Court found to be strong evidence of the "ineffectiveness" of the Michigan program. *Id.*

This Court revisited the checkpoint issue, albeit in dicta, in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). Following the logic of *Brignoni-Ponce*, this Court held that random roving patrol stops to check for license and registration violations were unconstitutional. The Court reached that specific holding on the basis of its expressed concern about the potential for abuse resulting from extensive officer discretion. The Court emphasized the absence of such a concern in checkpoint stops, stating:

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.

The constitutionality of properly conducted roadblocks more recently was acknowledged by the Court in *Texas v. Brown*, 460 U.S. 730 (1983), in which the Court unanimously recognized that a roadway checkpoint for license and registration was a constitutionally permitted stop. Id. at 739. The

Court went on to hold, in a ruling unanimous in result but divided in reasoning, that a "plain-view" search resulting in the seizure of unlawful narcotics incident to the lawful roadblock "stop" was constitutionally valid.

MADD respectfully submits that *Prouse*, *Martinez-Fuerte*, and *Texas v. Brown* collectively establish that in assessing the constitutionality of roadblock stops of automobiles the appropriate test is to weigh the state interest to be served by the roadblock against the intrusion caused by the checkpoints. This is the test adopted by a number of state courts addressing this issue.[4] The Trial Court, however, inexplicably ignored *Texas v. Brown*, and appeared to be unaware of the sharp distinction that this Court has drawn between seizures conducted pursuant to discretionary police authority and checkpoints operated with minimal discretion.

The Trial Court's emphasis on the earlier decision in *Brown v. Texas* need not have led it into error. Immediately following its discussion of the balancing analysis that specifically cited *Prouse* and *Martinez-Fuerte*, this Court in *Brown v. Texas* set forth a standard which requires affirmation of the Michigan checkpoint program:

> To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.*

[4] *State v. Garcia*, 481 N.E.2d 148 (Ind. App. 1985); *Lowe v. Commonwealth*, 337 S.E.2d 273 (Va. 1986); *Commonwealth v. Trumble*, 483 N.E.2d 1102 (Mass. 1985); *State v. Golden*, 318 S.E.2d 693 (Ga. App. 1984). In addition, two states have upheld roadblock checkpoints simply citing the Court's language in *Prouse*. *Kinslow v. Commonwealth*, 660 S.W.2d 677, 678 (Ky. App. 1983); *State v. Goins*, 473 N.E.2d 1219, 1222 (Ohio App. 1984).

443 U.S. at 51 (emphasis supplied). *Brown v. Texas* is consistent with *Prouse* and *Martinez-Fuerte* in upholding limited checkpoint seizures justified by the public interest where the seizures are conducted pursuant to a plan embodying limitations on the discretion of individual officers.

The two-part balancing test for nondiscretionary seizures has been adopted by this Court in other contexts as well. In *Skinner v. Railway Labor Executives Association*, 109 S.Ct. 1402 (1989), this Court reversed a finding that the Federal Railroad Administration regulations requiring drug and alcohol testing of certain employees were unconstitutional. Citing *Prouse*, the Court stated:

> The permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

109 S.Ct. at 1414. The Court upheld the regulations, emphasizing the "standardized nature of the tests and the minimal discretion vested in those charged with administering the program . . ." *Id.* at 1415-1416. The Court found that the Government had a legitimate interest in taking "all necessary and reasonable regulatory steps to prevent or deter" employees from performing their tasks while impaired by drugs or alcohol. *Id.* at 1421.

This Court also recently sustained the constitutionality of a drug-testing program for certain Customs Service employees. *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989). In an analysis equally pertinent to the Michigan sobriety checkpoints, and fatally inconsistent with the Trial Court's opinion, this Court wrote:

> The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. . . . Where, as

> here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.

109 S.Ct. at 1395. The Court outright rejected any test requiring statistical proof of the effectiveness of the program in producing arrests. *Id.* at 1396 n.3.

The Trial Court's findings on state interest and officer discretion alone are sufficient to establish the facial constitutionality of the Michigan sobriety checkpoint program.[5] The Trial Court's conclusion that the sobriety checkpoint program is not the most effective possible means of combatting the drunk driving problem, even if valid, does not justify invalidation of the Michigan statute. No one can deny, on the basis of the record herein or common sense, that sobriety checkpoints are at the very least one technique for arresting drunk drivers and deterring those who would otherwise drink and drive. Since the potential harm to the public is undeniably substantial, brief nondiscretionary stops to advance the state's public safety goals are justified.

B. Proper Application Of The Balancing Test In *Brown v. Texas* Establishes The Validity Of The Michigan Checkpoint Program.

As stated above, MADD does not believe that the three-prong test in *Brown v. Texas* applies to non-discretionary automobile checkpoints. *Brown v. Texas* involved neither checkpoints nor automobiles. Instead, it addressed the constitutionality of a discretionary seizure and arrest of a pedestrian in an alleyway for failure to produce proof of identification. The facts in *Brown v. Texas* therefore implicated privacy and harassment concerns not presented by automobile checkpoints.

[5] MADD concedes that individual challenges to particular seizures based, for example, on departures from the standards imposed by the Guidelines could still be appropriate.

First, it long has been recognized that an individual has a lesser privacy interest in an automobile than in other contexts. *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976). Thus, no "search" occurs when an officer examines the contents of an automobile through its windows, or open doors or trunk, see *Katz v. United States*, 389 U.S. 347 (1967), even when the view is made possible through the use of a flashlight. *See, e.g., United States v. Lee*, 274 U.S. 559 (1927). Similarly, the use of non-discretionary checkpoints simply does not invoke the potential for fear and surprise presented by the random stop of pedestrians or vehicles.

Even if the *Brown v. Texas* three-part balancing test were the appropriate test of the constitutionality of the Michigan program, it would require explicitly a "balancing" of the public and private interests implicated:

> The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends " 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers' " . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty . . ."

443 U.S. at 50-51 (citations omitted). The Trial Court, however, erroneously viewed the elements set forth in *Brown v. Texas* not as factors to be weighed in determining the reasonableness of the seizure, but instead as multiple independent requirements, *each* of which had to be met by the State Police. It stated:

> It is incumbent on defendants to show a) a legitimate state interest, b) that the checkpoints substantially furthered that interest, and c) that both the objective and subjective intrusion on an individual's liberty interest was minimal.

Trial Court at 52.

Despite finding that the State's interest was a strong one and that the objective intrusion on the individual was minimal, Trial Court at 26, 48, the Trial Court concluded that "defendants have failed in their burden of proof" because the evidence showed only "a minimal degree of effectiveness in curbing drunk driving" and that the subjective intrusion on the individual as a result of "potential fear and surprise" was substantial. The Trial Court's failure to engage in any "balancing" of these findings was additional error on its part.

C. The Trial Court Erroneously Required The State Police To Prove That Sobriety Checkpoints Are More "Effective" Than Any Less Intrusive Law Enforcement Technique.

The Trial Court not only required the State Police to provide evidence that sobriety checkpoints would produce results that would *significantly*[6] further the articulated state interest, but further required the State Police to prove that no alternative means would be more successful.[7] The Trial Court unequivocally held that it was not enough for the State

---

[6] The Trial Court specifically rejected uncontroverted evidence that demonstrated some arrests, some deterrence and some short-term beneficial impact from sobriety checkpoint programs as insufficient to uphold the Michigan program. Trial Court at 32-36.

[7] Indeed, the Trial Court discounted as insignificant evidence that sobriety checkpoint programs in conjunction with other law enforcement initiatives reduced the incidence of DUI accidents because there was no showing as to the impact of the checkpoint aspects of the program alone. Trial Court at 32-36.

Police to show that sobriety checkpoints were a reasonable means to achieve the State's goal:

> Accordingly, the Court finds those cases noted above which base their result on merely whether the police have a reasonable plan-not persuasive [sic] . . .

Trial Court at 24.

Indeed, it appears that the Trial Court required the State Police to prove that there were *no* other means of achieving the articulated goal. It stated:

> The Court . . . lastly examines the extent to which there is no practical alternative means available to the State to advance its interest other than by implementing sobriety checkpoints.

Trial Court at 38. The Trial Court also held that the inquiry depends on:

> examining the degree to which it can be said that there are not permissible alternative means available to the police which advance the particular state concern.

Trial Court at 27.

No prior court has ever sanctioned a "*no* alternative" approach to assessing the constitutional reasonableness of searches and seizures. Even the "less intrusive" or "less restrictive alternative" analysis has been rejected by courts considering the propriety of sobriety checkpoints. *Commonwealth v. Shields*, 521 N.E.2d 987, 990 (Mass. 1988) ("Less intrusive alternative analysis traditionally has not been employed in determining the constitutional reasonableness of searches and seizures.").

The *Shields* view is fully supported by a long line of cases from this Court. *See United States v. Sharpe*, 470 U.S. 686, 686-687 (1985) ("A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative

means by which the objectives of the police might have been accomplished. . . . The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or to pursue it."); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973). The Trial Court simply ignored the fact that, in evaluating the constitutionality of checkpoints, this Court specifically rejected a less restrictive means analysis in *Martinez-Fuerte*:

> The logic of such elaborate less-restrictive alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizures powers.

428 U.S. 556 at n.12. Earlier this year, the Court reiterated its rejection of that technique in *Skinner*, 109 S.Ct. at 1419, n.9. Accordingly, it is apparent that the Trial Court erred in this additional respect.

D. The Evidence Presented To The Trial Court Was Insufficient To Support The Invalidation Of Sobriety Checkpoints In Michigan.

In its ruling, the trial court effectively substituted its own policy views for the considered conclusions of the Michigan Legislature, Governor, and task forces of experts appointed to address the public safety threat of drunk driving. The task forces that ultimately recommended the use of sobriety checkpoints and structured the detailed guidelines for their implementation spent years in their studies. Their considered opinions and recommendations were rejected by the trial court on the basis of a limited record adduced over the space of a week on the basis of less than two hours actual experience with the Michigan sobriety checkpoint program.

This exceeds the appropriate judicial role as delineated in decision after decision of this Court. Here, as in this Court's recent decision in *Skinner*, there was an invitation to judicial activism that would, "at bottom," require the Court "to

second-guess the reasonable conclusions drawn by [public officials] after years of investigation and study." 109 S.Ct. at 1419 n.9. This Court in *Skinner* declined that invitation. The Trial Court here did not, and thereby erred.

The existence of a strong state interest in reducing the staggering number of deaths and injuries caused by drunk driving has been acknowledged throughout these proceedings. The trial court, even on the limited record presented, had ample uncontroverted evidence from which any reasonable person would conclude that sobriety checkpoints do result in arrests of some drunk drivers and do deter others. Although, the duration of the deterrent effect and the cost/benefit impact of sobriety checkpoints as contrasted with other forms of enforcement were questioned by some witnesses, the State Police presented substantial evidence that the number of DUI incidents had decreased in areas that had used sobriety checkpoints.[8]

While ignoring or discounting the evidence offered by the State Police, the Trial Court made a critical finding based on nothing more solid than its own speculation about human reactions. The opponents of the Michigan program presented *no* direct evidence that the checkpoints actually did or would "generate fear and surprise to motorists." The Trial Court nevertheless made such a finding, and then jumped to its conclusion that the "subjective" intrusion on motorists from the checkpoints was "substantial". Trial Court at 54.

---

[8] This evidence was partly discounted by the trial court because of the existence of other deterrent programs in those areas and partly because of the trial court's fixation on the number of arrests as the critical factual justification for the program. Trial Court at 32-36. In fact, as set forth *infra* at 23-24, a far more important and meaningful statistical measure is the reduction in DUI-related accidents.

Even on the "effectiveness" issue, the evidence presented by the opponents of the program was inconclusive. For example, the testimony as to the supposed short-lived nature of the deterrent effect presumed a subsequent cessation of the program. No evidence was presented that the ongoing checkpoint programs planned by the State Police would not maintain, or even increase, the beneficial short-term impact. Indeed, as discussed *infra* at 25-26, studies do support the long-term deterrent impact of regularly maintained checkpoint programs.

There was simply no evidence that sobriety checkpoints do *not* reduce DUI related crashes. Viewing the record most favorably to Respondents, the evidence was that empirical studies from other states neither conclusively prove or disprove the beneficial impact of sobriety checkpoints on DUI related crashes. The very limited opportunity for sobriety checkpoints in Michigan obviously precluded any reliable conclusions on this issue based on actual experience with the conditions in that State.

The Trial Court's holding was tragically wrong not only because it struck down a valid and badly needed law enforcement program, but also because of the stultifying effect it would have on state law enforcement initiatives in general. If upheld, it would place the states in an intolerable "Catch 22" situation, wholly at odds with our system of federalism. According to such a holding, a state may *commence* a law enforcement program involving "seizures less intrusive than traditional arrests" only if it can first present convincing proof that the program will be more effective in achieving the public interest objective than other methods. Since no such factual showing can be made without having substantial experience in operating such a program, the states are largely precluded from implementing new and innovative programs to address the increasing public safety challenges they face.

Plainly, that has never been and never should be the law of the United States. The essential folly of the Trial Court's logic was recognized by the California Supreme Court in rejecting a challenge to sobriety checkpoints:

> The experience both in California and in other states with sobriety checkpoints has been very limited, and no definitive statistics are available. It would be presumptuous in the extreme for this court to prohibit the use of an otherwise permissible and potentially effective procedure merely because its effectiveness is at the present time largely untested. Indeed, to do so would prevent the compilation of any data to show its effectiveness.

Ingersoll v. Palmer, 743 P.2d 1299, 1311-1312 (Cal. 1987). Reversal of the judgment in this case therefore is essential to the encouragement of innovative efforts by the states to protect their citizens from crime.

E. The Trial Court Incorrectly Focused On Arrest Numbers As The Measure Of The Effectiveness Of Sobriety Checkpoints.

The Trial Court selected an inappropriate measure — number of arrests — as the primary criterion of the effectiveness of the sobriety checkpoint program. The simple fact is that a "low" number of arrests can be interpreted plausibly to support diametrically opposed conclusions. If arrests are low, one can conclude that the enforcement program was ineffective in identifying and arresting lawbreakers. However, an equally reasonable conclusion from the same fact is that the program was highly effective in deterring the unlawful conduct. The ultimate goal of any enforcement program should be to reduce the number of drunk drivers and thereby reduce the number of alcohol-related deaths and injuries. The success of any program, therefore, should be judged on

its potential to achieve that ultimate goal and not on the inconclusive measure relied on by the Trial Court.

The fallacy of the Trial Court's approach was recognized by this Court earlier this year in *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1395. In response to the argument that the employee drug testing program was unreasonable because it had detected only 5 drug users of 3600 employees tested, the Court noted:

> The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, see *Camara v. Municipal Court*, 387 U.S. 523 (1967), and of motorists who are stopped at the checkpoints we approved in *United States v. Martinez-Fuerte*, 428 U.S. 343 (1976).

The Court noted that the Government's airport screening program had detected only 42,000 firearms after screening over 9.5 billion persons and over 10 billion pieces of luggage, and stated:

> When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success. *See Bell v. Wolfish*, 441 U.S. 520, 559 (1970).

109 S.Ct. at 1396 n.3.

The evidence presented to the Trial Court established that "the purpose of the checkpoints would be primarily to deter, and only secondarily, to apprehend drunk drivers." Trial Court at 10. Moreover, the trial court had before it testimony

that sobriety checkpoints do deter drunk driving (see testimony of Lt. Cotton described in Trial Court at 32) and data relied upon by other courts finding a deterrent effect from checkpoints. *See Ingersoll*, 743 P.2d at 1311-1312; *People v. Scott*, 473 N.E.2d 1, 5-6 (N.Y. 1984); *State v. Superior Court*, 691 P.2d 1073, 1077 (Ariz. 1984). Because the number of arrests in the brief Michigan experience was, in the Trial Court's view, "low," it logically should have concluded that the program — including the publicity that was specified in the Guidelines — had been effective in achieving that primary objective of deterrence. The Trial Court's myopic focus on actual arrests, however, led it to the erroneous opposite conclusion that the program was ineffective.

F. The Trial Court Ignored Evidence From Reported Cases That Supported The Use Of Sobriety Checkpoints.

The Trial Court recognized that the Michigan sobriety checkpoint program was "largely modelled on the Maryland plan." Trial Court at 10. The Trial Court also discussed the legal standards applied in the reported cases addressing the constitutionality of sobriety checkpoints, including *Little v. State*, 479 A.2d 903, 913 (Md. 1984). Trial Court at 14. However, the Trial Court ignored the critical factual findings made by the Maryland Supreme Court in holding the Maryland program constitutional.

Evaluating a program substantially identical to the Michigan program, the Maryland Supreme Court found:

> The record before us demonstrates that for the limited period of its operation, the sobriety checkpoint program has been a moderately effective technique for detecting and deterring the drunk driver .... Of greater significance is the evidence in the record indicating that the pilot program had a substantial impact on the drunk driving problem. Police attending the checkpoints found

> that many drunk individuals asked a sober spouse or companion to drive instead. Taxi companies reported a substantial increase in business from intoxicated persons who had been deterred from driving.

Other cases expressly considered by the Trial Court also provided evidence supporting the use of sobriety checkpoints. In *State v. Superior Court*, 691 P.2d 1073, 1076-77 (Ariz. 1984), the Arizona Supreme Court found that the police had

> introduced statistics that the percentage of injuries that were alcohol-related from September to December 1983 was between 9 and 11.5. From 1 December to 8 December this percentage was also 11.5. That number fell to 8 percent after the roadblock was instituted. This drop is particularly significant in light of the fact that a high percentage of alcohol related accidents traditionally occur in December.

The New York Court of Appeals also had recognized the evidentiary support for the effectiveness of sobriety checkpoints:

> The value of roadblocks in decreasing drunk driving is attested by both the United States Department of Transportation and the Governor's Alcohol and Highway Safety Task Force. A 1983 paper on Safety Checkpoints for DWI Enforcement issued by the Department of Transportation's National Highway Traffic Safety Administration's Office of Alcohol Countermeasures emphasizes the importance of informing the public about DWI checkpoint operations as the chief means of deterring driving while intoxicated (id., at p. 26), and the Governor's Task Force found 'that the systematic, constitutionally conducted traffic checkpoint is the single most effective action in raising the community's perception of the risk of being detected and apprehended for drunk driving' (Report, at p. 103).

People v. Scott, 473 N.E.2d 1, 4-5 (N.Y. 1984). Again, the Trial Court expressly noted the New York decision but was blind to its findings. Trial Court at 14.

III. CURRENTLY AVAILABLE PUBLISHED EVIDENCE DEMONSTRATES THE EFFECTIVENESS OF SOBRIETY CHECKPOINT PROGRAMS.

As set forth above, MADD firmly believes that the Trial Court's strong emphasis on actual arrest rates, standing alone, was misplaced. Nevertheless, even judged by actual arrests alone, there is strong evidence that sobriety checkpoints are effective. Most studies indicate that, at checkpoints geared toward arrest[9], between one and two percent of the drivers interviewed will be arrested. This statistic is confirmed by the very limited actual experience in Michigan.[10]

To properly assess any arrest rate, however, one must first consider that studies indicate that the number of drivers on the road during high-risk weekend nights with a blood alcohol content ("BAC") in excess of the legal limit is between three and five percent[11]. Thus, one would expect to encounter at a checkpoint operated at such times only three to five such drivers per one hundred. If one to two percent of the drivers who arrive at such a checkpoint are arrested, that

---

[9] Some checkpoints, such as the Michigan checkpoint, are geared principally to deterring drunk driving by maximizing the number of persons encountering officers at the checkpoint.

[10] Two of the one hundred and twenty-six drivers through the checkpoint were arrested.

[11] Wolfe, "Characteristics of Alcohol-Impaired Drivers" presented at Automobile Engineering Meeting, Society of Automotive Engineers.

may represent an arrest rate of twenty to fifty percent or more of the drunk drivers. By way of contrast, the actual probability of arrest for a driver with a BAC in excess of the legal limit during an intensive roving patrol enforcement program is only one in two hundred.[12] Thus, the actual arrest rate at sobriety checkpoints is far higher than that achieved through roving patrols.

Sobriety checkpoints also are more efficient in terms of officer time per arrest. In a study conducted in Charlottesville, Virginia,[13] traditional DWI patrols required almost eight hours per officer for each arrest, whereas checkpoints resulted in one arrest per less than seven officer hours. Similar results were observed in a report by the Transportation Safety Board evaluating the traditional and checkpoint programs in New Jersey[14].

In addition to efficiencies in manpower required to effect arrests, checkpoints are more effective in both deterring and arresting the drivers who are legally intoxicated, but who do not have BACs greatly in excess of the legal limit. This significant benefit was recognized in *Commonwealth v. Tarbert*, 535 A.2d 1035, 1042 (Pa. 1987). Upholding sobriety checkpoints, the Pennsylvania Supreme Court said:

> A 1984 safety study by the National Transportation Safety Board indicated that without sobriety checkpoint programs, many alcohol impaired drivers believe they

[12] Beitel, Sharp and Glauz, "Probability of Arrest While Driving Under the Influence of Alcohol," *Journal of Studies of Alcohol* 36: 237-256 (1975).

[13] Voas, Rhodenier and Lynn, *Evaluation of the Charlottesville Checkpoint Operations*. Report DOT-HS-806-989, National Highway Traffic Safety Administration, Washington, D.C. (1985)

[14] Levy, Shea and Asch, "A Further Assessment of DWI Programs in New Jersey." Office of Highway Safety, Trenton, N.J. (1987)

> can avoid police detection by driving carefully. However, with the use of sobriety checkpoints, the general public's perception of the probability of detection and sanction is increased. [This] public perception has a strong basis in fact. While those drunk drivers arrested by roving patrols average a .169 to .20 blood alcohol content (BAC) level, drunk drivers arrested at Delaware sobriety checkpoints averaged a .14 BAC level. In light of the fact that a driver with a .10 BAC level has a six times greater likelihood of causing an accident than a sober driver, the effectiveness of sobriety checkpoints in detecting and removing drunk drivers with dangerous but significantly lower BAC levels is significant.

Of even greater importance, sobriety checkpoint programs have demonstrated both short-term and long-term reductions in the incidence of alcohol-related accidents. Reductions of various lengths have been demonstrated in studies conducted in Charlottesville, Virginia;[15] Clearwater, Florida;[16] Bergen County, New Jersey;[17] and Arizona[18]. The Charlottesville study reported a ten to thirteen percent reduction in alcohol-related crashes. The Clearwater study reported a twelve percent reduction in alcohol-related crashes. The Bergen County study reported reductions of ten to fifteen percent in single vehicle nighttime alcohol-related crashes during the first two years of the checkpoint program and as much as a

[15] Baas, *et al. supra.*

[16] Lacey, *Enforcement and Public Information Strategies for DWI General Deterrence: The Clearwater and Largo, FL Experience.* Report DOR-HE-807-066, National Highway Traffic Safety Administration, Washington, D.C. (1986)

[17] Levy, *supra.*

[18] Epperlein, "The Use of Sobriety Checkpoints as a Deterrent: An Impact Assessment," State of Arizona Analysis Center, Phoenix, AZ. (1985)

twenty-nine percent decrease in subsequent years. The Arizona study also reported significant reductions in alcohol-related crashes following implementation of the checkpoint program.

Perhaps the most comprehensive study of the long-term effect of sobriety checkpoints comes from New South Wales, the most populous area in Australia.[19] Nearly one-third of the population there is exposed to sobriety checkpoint operations each year. Following implementation of the checkpoint operations, alcohol-related fatal crashes fell by more than thirty percent and have remained at that reduced level for four to five years.

The trial court also ignored available evidence regarding the subjective impact of sobriety checkpoints. Surveys conducted in Charlottesville and Blacksburg, Virginia demonstrated that the public strongly supported checkpoints. Indeed, eighty-seven percent of the nighttime drivers in Charlottesville (the group specifically impacted by the checkpoints) either strongly supported or somewhat approved the use of checkpoints. Interestingly, the support for checkpoints was stronger in Charlottesville, where checkpoints were in use, than in Blacksburg where no checkpoints were used.[20] Generally speaking, surveyed drivers over-

[19] Homel, Carseldine and Kearns "Drink-drive countermeasures in Australia. *Alcohol, Drugs and Driving* 113-144 (1988).

[20] Although interesting, this result is hardly surprising. It supports the common sense view that whatever fear or concern the public may have regarding checkpoints is lessened as the public actually experiences and becomes familiar with their operation.

whelmingly approve of the use of sobriety checkpoints to reduce alcohol-related fatal crashes.[21]

The polls therefore negate the Trial Court's unsupported conclusion that "the checkpoints sought to be implemented in this case do have the potential for generating significant degrees of surprise and fear in motorists passing through them." Trial Court at 51. Public polls favoring sobriety checkpoints strongly indicate that they generally will be met with relief and welcome rather than "fear and surprise." Moreover, any "fear and surprise" will diminish over time as the driving public becomes familiar with sobriety checkpoints — at least if they are allowed to operate for more than an hour and fifteen minutes.

Not only does the public favor sobriety checkpoints, but it also recognizes those checkpoints as effective. Numerous surveys have concluded that checkpoints are noticed more by the public, particularly drinking drivers, than any other enforcement technique.[22] The public believes that sobriety checkpoints result in a higher probability of arrest than other techniques.[23] In Clearwater and Largo, Florida, where checkpoints were employed, survey respondents were significantly more aware of recent increases in DWI enforcement than respondents in Sarasota and Bradenton, where checkpoints were not used. A study conducted in Massachusetts and New Hampshire found that residents in areas using roadblocks

[21] Hingson, "1987 Massachusetts/New Hampshire Road Block Surveys," Governor's Highway Safety Bureau, Boston, Massachusetts (1987); Voas, *supra*; Baker, "Roadside Sobriety Checkpoint Operations in the District of Columbia," Presentation at Lifesavers/6, Boston, MA (1988).

[22] Lacey, *supra*; Hingson, *supra*; Williams and Lund, "Deterrent Effects of Checkpoints on Drinking and Driving," Insurance Institute for Highway Safety, Washington, D.C. (1984)

[23] Lacey, *supra*; Hingson, *supra*; Williams and Lund, *supra*.

were much less likely to drive after drinking than residents in areas employing only roving patrols. Residents in both states felt that checkpoints would produce greater declines in drunk driving than roving patrols.[24]

Another poll contrasted residents of Fairfax County, Virginia (a county with intense DWI enforcement effort, but no checkpoints) with Montgomery County, Maryland (a lower level of DWI enforcement, but use of checkpoints). Residents of both Fairfax and Montgomery Counties felt that the probability of being arrested was greater in Montgomery County than Fairfax County.[25] The same poll also compared residents of seven Delaware counties using checkpoints with nearby eastern Maryland counties not using checkpoints. As with Fairfax and Montgomery Counties, drunk driving arrests were perceived to be significantly more likely in the Delaware counties employing checkpoints than in the Maryland counties using only traditional methods.

If the "effectiveness" of sobriety checkpoints is indeed at issue in applying the Fourth Amendment, the overwhelming consensus of informed opinion on that subject cannot be ignored. Michigan is by no means unique in its conclusion that sobriety checkpoints are a vital component in the arsenal to combat drunk driving. Sobriety checkpoints have been advocated by virtually every expert body to address the issue. In 1983, the Presidential Commission on Drunk Driving[26] recommended sobriety checkpoints to increase the public's perception of the risk of apprehension for DUI. In 1984, the National Transportation Safety Board recommended that all

---

[24] Hingson, *supra*.

[25] Williams and Lund, *supra*.

[26] Presidential Commission on Drunk Driving *Final Report*. Available from the National Commission Against Drunk Driving, Washington, D.C. (1983).

states implement or expand the operation of sobriety checkpoints.[27] Numerous other organizations also support the use of sobriety checkpoints to save lives.[28]

CONCLUSION

MADD respectfully submits that difficult public policy judgments as to the "effectiveness" of law enforcement programs are properly left to the legislatures and executive officials of the states, and not to ad hoc judicial decrees. The Fourth Amendment is satisfied when the state interest is strong, the objective intrusion from the checkpoint is minimal, and the discretion of the officers is carefully controlled. Under the Trial Court's findings, and in fact, the Michigan program clearly met these standards. Michigan, and other states, should now be freed from judicial hyper-scrutiny and given the chance to develop and refine this important tool for

---

[27] National Transportation Safety Board, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocation*. NTSB/55-84/01, Washington, D.C. (1984).

[28] *See, e.g.*, the National Safety Council, the International Association of Chiefs of Police, the Insurance Institute for Highway Safety and others.

achieving the most crucial goal of government: protecting the lives and safety of their citizens.

Respectfully submitted,

HUGHES & LUCE

BY: _____
DAVID BRYANT
ERIC R. CROMARTIE

2800 Momentum Place
1717 Main Street
Dallas, Texas 75201
(214) 939-5500

Attorneys for National Organization of Mothers Against Drunk Drivers

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 28, Supreme Court Rules, on this 15th day of November, 1989.

_____

AMICUS CURIAE

BRIEF

MOTION FILED
NOV 15 1989

No. 88-1897

In The
Supreme Court of the United States
(October, 1989 Term)

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,
Petitioners,

-v-

RICK SITZ, JOSEPH F. YOUNG, SR. DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,
Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

AMICUS CURIAE BRIEF OF MICHIGAN STATE CHAPTERS OF MOTHERS AGAINST DRUNK DRIVING (MADD) SUPPORTING SOBRIETY CHECKPOINTS

MANSOUR, RIZIK, RIZIK AND ZINTSMASTER, P.C.
Michael B. Rizik, Jr.
Attorney for Michigan State Chapters of Mothers Against Drunk Driving (MADD)
1000 Beach Street
Flint, Michigan 48502
(313) 233-0484

RENAISSANCE PRINTING, INC., 1133 GRISWOLD
DETROIT, MICHIGAN 48226 (313) 964-3185

REFERENCES

The Michigan State Chapters of MADD relied on the following references when preparing this Brief:

1) *Evaluation of Charlottesville Checkpoint Operations*, DOT HS 806 989, Final Report, (May, 1985).

2) *Enforcement and Public information Strategies for DWI Deterrence; Arrest Drunk Driving — The Clearwater and Largo, Florida Experience*, DOT HS 807 066, Final Report, (December, 1986).

3) *Drink-Driving Countermeasures in Australia*, R. Homel, et al; *Alcohol, Drugs and Driving*, Vol. 4, No. 2; pp 113–144 (1988).

4) *The Influence Of Alcohol Countermeasures In Changing Drink Driving Attitudes*: G.W. Trinca; Asia-Pacific Journal of Public Health, Vol. 2, No. 1; Jan. 1987.

ISSUE PRESENTED

WHETHER OR NOT THE MICHIGAN SOBRIETY CHECKPOINT PROGRAM IS A CONSTITUTIONAL SEARCH AND SEIZURE.

The Michigan State Chapters of Mothers Against Drunk Driving (MADD) say "Yes."

AMICUS CURIAE BRIEF OF MICHIGAN STATE CHAPTERS OF MOTHERS AGAINST DRUNK DRIVING (MADD) SUPPORTING SOBRIETY CHECKPOINTS

The Michigan State Chapters of MADD, with the consent of all parties involved, file the following Amicus Curiae Brief in support of the Michigan Sobriety Checkpoints.

I.

STATEMENT OF INTEREST

The Michigan State Chapters of MADD incorporate by reference the Michigan Attorney General's (MAG) legal arguments. The purpose of this Amicus Curiae Brief is to support the MAG's legal argument and counter the findings of Michigan's Courts by addressing statistically the effectiveness, deterrence and lack of intrusiveness of checkpoints.

MADD was founded in May, 1980 primarily to remove drunk drivers from the road by forcing the legal and enforcement systems to deal more effectively and appropriately with the drunk driver, reduce the numbers of deaths and injuries caused by drunk driving, and to provide support to the victims of drunk driving crashes.

MADD has long advocated the position of the deterrence model in social science which states that a threat will be more powerful if it is certain, severe and closely related in

time to its object. We believe that the continued and unabated pressure to identify drunk drivers prior to serious crashes by effective, constitutional methods will persuade others not to drink and drive. One such method is the sobriety checkpoint program utilized in Michigan.

Evidence for the effectiveness of sobriety checkpoints may be found in the study of the Charlottesville, Virginia checkpoint program, which the National Highway Traffic Safety Administration (NHTSA) funded.

II.

ARGUMENT

Although the Michigan State Chapters of MADD will rely on the MAG's legal arguments, a brief discussion of law is appropriate to set the stage for the remainder of this Brief. First, The Michigan State Chapters of MADD agree that the correct constitutional test is found in *Brown* v *Texas*, 443 U.S. 47 (1979). At 443 U.S. 47, 50–51, the Court stated:

> "The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizures advance the public interest and the severity of interference with individual liberty."

The Michigan Trial Court and Court of Appeals in the instant case therefore used the three-pronged *Brown, supra*, test:

1. State interest
2. Effectiveness
3. Intrusiveness

With respect to "state interest," the Trial Court in the instant case held, at page 26 of its Opinion, that the carnage and devastation caused by drunk driving were known, and that "there is a grave and legitimate State interest in curbing drunk driving." The parties to this litigation agreed, and "state interest" is therefore not an issue before this Supreme Court.

However, with respect to effectiveness, the Michigan Trial Court stated at page 42 of its Opinion:

> "In summary of the foregoing, the Court finds that sobriety checkpoints are not an effective means to apprehend drunk drivers, that such checkpoints do not have any long-term deterrent effect, and that there exists alternative means available to the Defendants in their effort to curb drunk driving."

Finally, with regard to intrusiveness, the Trial Court concluded at page 51 of its Opinion, that:

> "The Court thereby finds that sobriety checkpoints of the type which are contemplated by defendants' plan do have a significant subjective intrusive impact on a person's liberty interests."

This Amicus Curiae Brief addresses these latter two Michigan Trial Court holdings regarding effectiveness and intrusiveness.

A. THE CHARLOTTESVILLE, VIRGINIA CHECKPOINT OPERATIONS

In 1983–84, NHTSA sponsored a sobriety checkpoint program in Charlottesville, Virginia through a grant from the Virginia Office of Highway Safety. [*Evaluation of Charlottesville Checkpoint Operations, R. Voas, et al; DOT HW 806 989 — Final Report (May, 1985)*] The checkpoint operation lasted from December 20, 1983 to December 31, 1984. This study demonstrated that a checkpoint program, when carefully planned, is an effective, minimally intrusive method of apprehending drunk drivers exceeding the effectiveness of traditional, random police patrols. Clearly, the checkpoint operation increased the public's perception that if you drink and drive, you would more than likely be caught.

During the year-long operation, 94 checkpoints were conducted involving almost 24,000 drivers being stopped the interviewed. A procedural manual was developed and used to insure that checkpoints would be in accord with Federal and State Court decisions. (Evaluation of Charlottesville Checkpoint Operations, supra, p 3) Checkpoint sites were selected on the basis of the occurrence of alcohol-related crashes. (Id, p 3)

The procedures manual strictly defined individual officer discretion as required by the courts. (Id, p 3) During the initial contact, the officer stated the purpose of the stop, requested the driver to produce his/her license, and observed the driver for signs and symptoms he/she had been drinking. (Id, p 4) The interview varied from 20 to 60 seconds depending upon the traffic flow, questions asked by the driver, and the time it took the driver to produce the driver's license. (Id, p 4) After the interview, the driver was waived on, unless a valid license was not produced or the officer suspected the driver had been drinking. (Id, p 4) If he/she failed to produce a valid license or was suspected to have been drinking, the driver was invited to move his vehicle to a safe, off-road location nearby where the second phase of the investigation was conducted. (Id, p 4)

At the off-road location, the driver's license status was checked by radio, and the officer conducted sobriety tests. (Id, p 4) If the driver was found to be impaired, he/she was cited for impaired or drunken driving (i.e., DUI). The Charlottesville procedures were substantially similar to those developed by the Michigan State Police. Michigan's procedures are set forth in detail in the MAG's Brief.

B. EFFECTIVENESS OF CHARLOTTESVILLE CHECKPOINTS

One measure of checkpoint effectiveness is the arrest productivity compared with that of alternative, traditional, random patrols. For the time period stated above, the Charlottesville checkpoints were in operation 4 hours per night, 94 total nights and 1,880 actual officer hours. They produced 290 DUI arrests, averaging one arrest per every 6.5 officers hours.

By comparison, the traditional DUI patrol which was studied in Charlottesville from January 1, 1983 through October 31, 1983, was in operation 4 hours per night, for 79 nights, involving a total of 632 officer hours. It produced 80 DUI arrests or approximately 1 arrest per 7.9 officer hours.

The productivity rate of 1 arrest per 6.5 officer hours demonstrated that checkpoints were more productive at identifying drunk drivers than the traditional DUI patrol. Further, if arrests can be assumed the benchmark of effectiveness, and, therefore, success, then checkpoints were more effective and productive than traditional patrols.

In the Charlottesville and Michigan checkpoint experiences, 1% of the drivers who were stopped at the checkpoints were arrested for DUI. The Michigan Trial Court found this measure of effectiveness was minimal. However, this U.S. Supreme Court has reviewed other checkpoint-type cases in which the rate of so-called effectiveness was lower than the sobriety checkpoints, and which *were held constitutional*. In *National Treasury Employees Union* v *Von Raab*, 57 USLW 4338 (1989), only five employees out of 3,600 (i.e., .139%) tested positive for drugs. In *Skinner* v *Railway Labor Executives Association*, 57 USLW 4324 (1989), breath, urine and blood testing for drugs and alcohol resulted in positive findings in slightly more than .1% of the tests. In footnote 3 of *National Treasury Employees Union*, *supra*, in which airport searches were discussed, only 42,000 firearms out of approximately 19.5 billion searches were produced. That was an "effectiveness" rating of .0002%. Finally, in *United States* v *Martinez-Fuerte*, 428 US 543 (1976), only 171 vehicles out of 146,000 (i.e., .117%) searched revealed deportable, illegal aliens at checkpoints. Given the grave and legitimate state interest in curbing drunk driving, comparable to and exceeding any public interest in the above cited cases, the Charlottesville and Michigan rates of effectiveness compel a review of the lower Courts' findings.

A much more important measure of checkpoint effectiveness is reduced alcohol related crashes. In Charlottesville, several measures of alcohol related crashes were examined,

and reductions in these ranged 8%–15%. The number of HBD (Had Been Drinking) vehicle crashes, for example, fell 15% in 1984 compared to the 1981–1983 period. Analysis indicated that HBD crashes were reduced by an average of 2.56 crashes per month during the checkpoint program period from the period preceding the program's implementation. Statistics indicated there were less than 5 chances in 100 that this reduction could have occurred by chance. There was also an 8% decline in the number of nighthour accidents, but this was not considered statistically significant. (Id, p 45)

Statistical tests were also employed to determine whether the reduction in alcohol related crashes in 1984 was lower than would have been expected from an overall downward trend in such crashes which existed before the initiation of the checkpoint program. Those tests revealed there were less than 2 chances in 100 that the magnitude of the reduction was due to weather, economic or other chance factors.

As a result, the researchers concluded that the checkpoint program was effective in reducing crashes related to drunken driving by approximately 10%.

C. DETERRENCE OF CHARLOTTESVILLE CHECKPOINT PROGRAM

Although the arrest productivity of checkpoints is as high or higher than other police patrols, the Michigan State Chapters of MADD contend that the effectiveness of checkpoints depends not so much on the number of drunk drivers arrested and convicted for their crimes, but by the public's *perceived* risk of apprehension.

To determine the effect of the checkpoint program in Charlottesville on the *perception* of the probability of arrest, a random telephone poll was conducted of 218 Charlottesville area residents who, because they drank and drove at night, were considered to be candidates for a checkpoint stop. When called, 79.3% of the Charlottesville group reported

it was somewhat or much more likely they might be arrested for DUI than it had been one year earlier before checkpoint operations. Almost half of those who reported an increase in arrest risk stated that checkpoints were the reason why arrest was more likely.

This poll also indicated that 1 in 4 of these *at risk* drivers had been stopped at a checkpoint, and half had seen a checkpoint in operation. This demonstrates the extent to which checkpoints create public awareness, a requirement which experts agree is essential to the success of any enforcement program.

These statistics contradict the Michigan Trial Court's conclusions that checkpoints do not deter drunk drivers.

D. INTRUSION OF CHARLOTTESVILLE CHECKPOINT PROGRAM

The next element of the *Brown, supra*, case which the Michigan Trial Court addressed was whether or not the Michigan checkpoint procedure involved unreasonable interference with the motorist's freedom to travel within the state. The Court found that objective interference was minimal, because the checkpoint generally involved a 30 second interview (Trial Court Opinion, p 43). Therefore, the issue became whether or not the checkpoints generated unreasonable subjective intrusion, in terms of its potential to create surprise and fear among the public, and in terms of untempered discretion among the police with regard to the stopping of individual vehicles.

With respect to officer discretion, the Trial Court stated, at page 51 of its Opinion:

> "The Court also finds that the discretion of the police in operating such checkpoints and determining their location is severely limited."

Thus, the primary remaining issue was whether or not the checkpoints potentially generated unreasonable subjective surprise and fear among unimpaired drivers. The Trial Court concluded that the Michigan checkpoint had "a significant subjective intrusive impact on a person's liberty interest." (Trial Court Opinion, pp 51–52).

The Michigan State Chapters of MADD feel the Trial Court erred in the latter holding. To begin with, checkpoint operations required posting of signs advising motorists of checkpoint operations. Secondly, the operations involved were lighted, safe locations manned by uniformed officers. Thirdly, officers immediately informed motorists of the checkpoint's purpose. Fourthly, procedures concerning stopping and questining were in writing, thereby limiting police discretion. As a result of these protections, a vast majority of motorists who passed through approved of them.

Next, the Charlottesville checkpoint follow-up telephone polling is instructive also. These telephone polls of public reactions to checkpoints in Charlottesville, and in neighboring Blacksburg, Virginia where no checkpoints were set up, firmly rebut the belief that they created significant fear and demonstrated that the public strongly supported checkpoints.

The question asked of the so-defined *at risk* driver was: "With regard to the use of sobriety checkpoints, do you — strongly approve, somewhat approve, somewhat disapprove, strongly disapprove of their use?" 87% of Charlottesville drivers who were most at risk of being stopped at a checkpoint approved this type of operation compared to 78% of similar drivers in Blacksburg, Virginia where there was no risk of being stopped at a checkpoint. Thus, familiarity and comfort with checkpoints increased their approval rating among those who have the most to fear from them! (Evaluation of Charlottesville Checkpoint Operations, p 32)

The Michigan State Chapters of MADD believe that these polls' results hint at something larger than mere public approval.

They indicate the public, especially those most at risk of being apprehended, is morally outraged with drunk driving, and the checkpoints are the focus of such moral deterrence.

At the other extreme, is the very drunk driver. If he is so drunk that he attempts to run a checkpoint, then he will suffer no fear or surprise, or any other appropriate emotion. Obviously, this person must be removed from the roads, and these checkpoints would help effectuate this purpose.

The only one who may suffer fear and surprise is the vehicle driver who has been drinking but still possesses some degree of ratiocination — he may seek to escape the checkpoint. If that occurs, then strategically placed State Police Troopers will stop and, if over the limit, arrest those whose driving behavior provides reason to believe they are impaired by alcohol. Under such circumstances, there will be "probable cause" to require an alcohol test before arresting the drunk driver. In any event, the Charlottesville researchers concluded that checkpoints generated virtually no subjective surprise and fear among the motorists passing through them.

E. THE AUSTRALIAN EXPERIENCE

Prior to implementing roadside checkpoints, the Australian drinking and driving problem was similar to that of the United States. There, alcohol abuse was the single most important factor contributing to road crash deaths and injuries "where solid drinking by the majority of the community is normal behavior" (The Influence of Alcohol . . . p 42). In 1982, New South Wales, Australia developed a drinking and driving control package featuring *random breath testing* (RBT), (i.e., sobriety checkpoints). (Id, p 42) Although a difference between the Australian checkpoints and those in the United States involved their randomness, a primary factor which contributed to their potential for impact was that they were conducted frequently over a substantial portion (i.e., ⅓) of the population.

Traffic crash data for the New South Wales, Australia checkpoint experience details the impact of RBT (*Drink-Driving Countermeasures In Australia*, R. Homel, et al; *Alcohol, Drugs and Driving*, Vol. 4, No. 2). Before the introduction of RBT, vehicle crash counts in New South Wales were stable for approximately 5 years, with the average number of fatal crashes each week at about 22.12. In the 5 years after RBT began, this average dropped 22% to 17.23. (Drink-Driving Counter Measures . . . p 132). Alcohol-related fatal crashes for 5 years before RBT averaged 13.43 per week. By the 4th year after the implementation of RBT, this average dropped 35% to 8.67 per week.

Further, in the 3 year period before RBT, the average number of drivers and riders killed with a blood alcohol concentration (BAC) of .05g% or more was 4.36 per week; however, in the 4 years after RBT was introduced, this average dropped 36% to 2.81 per week.

These figures refute the Michigan Courts' conclusions and respondents' contentions in this case on two points: First, the statistics show that sobriety checkpoints were effective in reducing alcohol-related crashes. Secondly, they showed that deterrence is long-term if the checkpoints were administered on a long-term basis with full commitment of the law.

Also interesting was the perception of the risk of apprehension (Drink-Driving Countermeasures . . . pp 134 and 135). A series of questionnaire surveys were conducted in New South Wales asking two questions:

(1) Did the respondents consider their present chances of being charged for drink-driving different than before RBT?

2) Did the respondents think there was anything they could do to reduce their chances of being stopped at an RBT station?

To the first of these questions, 76% of the respondents said their chances of being charged was higher or much higher during the first RBT (1982) survey. In a later (1984)

survey, the proportion increased to 87%, and in 1987, it was 86%. Further, the proportion of respondents who said "much higher" increased from 26% in 1983 to 40% in 1984, to 44% in 1987.

As to the second question, the proportion of respondents who answered "yes" that they could do something to reduce their chances of being stopped fell from 33% in 1982, to 27% in 1984, to 24% in 1987. These statistics provide compelling evidence that the public perceived checkpoints as being so effective that there was little or nothing that could be done to avoid them. Therefore, the statistics revealed long-term deterrence, as well as the public's rather immediate comfort with checkpoints.

Another important conclusion drawn by those studying the Austrailian Experience was that sobriety checkpoints increased the public's awareness of the moral culpability of an habitual drunk driver (Drink-Driving Countermeasures . . . p 138). Respondents to the above surveys reported an increasing and highly negative opinion of the drunk driver involved in a crash from 77% in 1982 to 86% in 1987. Likewise, there was an increasingly critical opinion of the drunk drivers stopped by police, rising from 63% in 1982 to 71% in 1987.

Finally, the surveys showed that support for RBT grew substantially in New South Wales after its introduction in 1982 (Drink-Driving Countermeasures . . . p 138). In 1982, 64% of the respondents indicated their support, 85% in 1983, to 97% in 1987. These statistics, consistent with those of the Charlottesville, Virginia checkpoint program, reveal virtual universal support for checkpoints and what they represent. Also, they reveal the weakness in the Michigan Courts' rulings and respondents' contention that checkpoints engender subjective fear and surprise, because it would be patently contradictory for nearly 100% of the survey respondents support checkpoints and at the same time fear them.

In short, the Australian experience not only increased awareness and proved to be an effective long-term deterrence to

drunk driving, but also changed the consciousness of the people who were most affected by it. Thus, the checkpoints achieved moral deterrence.

SUMMARY OF ARGUMENTS

The Michigan checkpoint program was generally similar to that in Charlottesville, Virginia, which showed clearly a significant impact in reducing alcohol related crashes and increasing productivity in apprehending drunk drivers. Further, Charlottesville demonstrated that a sustained checkpoint program increases the public awareness of the drunk driving problem and, of more specific relevance to deterrence, the perceived risk of arrest among drinking drivers.

The studies demonstrated 80%–90% of the public favors checkpoints, and the experience with them adds to their approval rating, and comfort level. Further indication of acceptance was that out of approximately 24,000 vehicles passing through the checkpoints in Charlottesville, only 9 drivers failed to stop.

The checkpoints were not only effective, but efficient in that 6.5 man hours were invested per DUI arrests at the checkpoints, as compared to 7.9 hours expended under the traditional, random patrol.

To the issue of long-term versus short-term deterrence, there is no question but that the Charlottesville checkpoints reduced alcohol related crashes 8% to 15% during the year the checkpoints were in operation compared to the prior three years.

While the impact of the Charlottesville program lasted for the year it was in place, the evidence for long-term effects is limited in this country, because few programs have been in place for an extended period. However, the Australian experience between 1977 and 1984 showed a fall in alcohol-related casualties from 39% to 25% of all automobile crashes. This indicates that a sustained checkpoint program will produce long-term results.

The Michigan Courts have imposed a catch-22 situation by ruling that, based on an incomplete record at the Trial Court level, checkpoints were not effective in the long-term. If this Supreme Court upholds the Michigan decisions, there will be no opportunities to collect new evidence on checkpoints anywhere in the United States. Simply, without evidence, there will be no checkpoints. Without checkpoints, there will be no new evidence, and on and on.

Finally, the Charlottesville and Michigan experiences show that the subjective level of intrusion is minimal, since the public strongly supports the checkpoint programs, the operations involved adequate warning to the public, uniformed officers operating in well lighted safe conditions and limited officer discretion.

IV.

CONCLUSION

The Michigan State Chapters of MADD's existence presumes that drunk driving is controllable. If it is effectively controlled, then as many as one-half of all fatalities in auto crashes could be avoided. Billions of dollars each year would be saved. The spillover into other areas of our national consciousness is bound to enhance our quality of life.

The Michigan State Chapters of MADD ask this Honorable Court to grant the following relief:

A. Reverse the Michigan Courts' rulings, and hold the Sobriety Checkpoint in Michigan is a constitutional search; and,

B. Allow counsel for the Michigan State Chapters of MADD a few moments to argue its position orally.

Respectfully submitted by,

MANSOUR, RIZIK, RIZIK
AND ZINTSMASTER, P.C.
Michael B. Rizik, Jr.
Attorney for the Michigan State Chapters of MADD
1000 Beach Street
Flint, Michigan 48502
(313) 233-0484

MOTION FILED
NOV 16 1989

(8)

No. 88-1897

In The
Supreme Court of the United States
October Term 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R.T. DAVIS, Director of the Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW AND JACK WELBORN,
Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

MOTION OF AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES, INC., REMOVE INTOXICATED DRIVERS, INC., AND DR. C. EVERETT KOOP, M.D. FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE SUPPORTING REVERSAL

RICHARD A. ROSSMAN
Counsel of Record

ABRAHAM SINGER
JAYNE F. CUCCHIARA
PEPPER, HAMILTON & SCHEETZ
100 Renaissance Center
36th Floor
Detroit, Michigan 48243
(313) 259-7110
Counsel for Movants

RENAISSANCE PRINTING, INC., 1133 GRISWOLD
DETROIT, MICHIGAN 48226 (313) 964-3185

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

Movants American Alliance for Rights and Responsibilities, Inc. (AARR), Remove Intoxicated Drivers, Inc. and Dr. C. Everett Koop, M.D., hereby respectfully move for leave to file the attached brief *amici curiae* in this case. Counsel for the Respondents has not consented to the filing of this brief.

The interest of the movants in this case arises from their desire to encourage a healthy balance between individualism and community in American life and to stop drunk driving utilizing law enforcement activities which are both effective and constitutional. Movants have proposed traffic sobriety checkpoints as constitutional and effective methods of reducing the incidents of drunk driving. This Court's determination of the constitutionality of traffic sobriety checkpoints will have a substantial effect on movants future activities.

Movants believe that the Briefs of Petitioners and Respondents omit several factors within Movants' unique experiences which may aid the Court in determining the constitutionality of traffic sobriety checkpoints.

Respectfully submitted,

RICHARD A. ROSSMAN
Counsel of Record

ABRAHAM SINGER
JAYNE F. CUCCHIARA
PEPPER, HAMILTON & SCHEETZ
100 RENAISSANCE CENTER
36TH FLOOR
DETROIT, MICHIGAN 48243
(313) 259-7110
Counsel for Movants

No. 88-1897

In The
Supreme Court of the United States
October Term 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R.T. DAVIS, DIRECTOR OF THE MICHIGAN DEPARTMENT OF STATE POLICE,
PETITIONERS,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW AND JACK WELBORN,
Respondents.

PROPOSED BRIEF AMICI CURIAE SUPPORTING REVERSAL

RICHARD A. ROSSMAN
Counsel of Record

ABRAHAM SINGER
JAYNE F. CUCCHIARA
PEPPER, HAMILTON & SCHEETZ
100 Renaissance Center
36th Floor
Detroit, Michigan 48243
(313) 259-7110
Counsel for Movants

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
MICHIGAN'S EFFECTIVE USE OF SOBRIETY CHECKPOINTS IS CONSTITUTIONAL SINCE THE BRIEF INTERRUPTION OF INDIVIDUAL MOBILITY IS FAR OUTWEIGHED BY THE STATE'S COMPELLING INTEREST IN DETERRING AND APPREHENDING DRUNK DRIVERS	3
A. THE COURT BELOW HAS MISAPPLIED GOVERNING FOURTH AMENDMENT PRINCIPLES IN HOLDING THAT SOBRIETY CHECKPOINTS ARE UNCONSTITUTIONAL	5
B. THE DEVASTATING CONSEQUENCES OF DRUNK DRIVING ARE WELL DOCUMENTED AND COMPELLING	7
C. SOBRIETY CHECKPOINTS ARE AN EFFECTIVE COMPONENT IN THE STATE'S COMPREHENSIVE, SYSTEMATIC APPROACH TO DETER AND APPREHEND DRUNK DRIVERS	8
D. SOBRIETY CHECKPOINTS IMPOSE NO MORE THAN A DE MINIMUS INTRUSION UPON LIBERTY INTERESTS	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

Breithaupt v. Abram, 352 U.S. 432 (1957) 2, 8

Brown v. Texas, 443 U.S. 47 (1979) 5, 6

Commonwealth v. Mimms, 434 U.S. 106 (1977) 3

Delaware v. Prouse, 440 U.S. 648 (1979) 4, 6

I.N.S. v. Delgado, 466 U.S. 210 (1984) 3, 16

National Treasury Employees Union v. Von Raab, ___ U.S. ___, 109 S.Ct. 1384 (1989)..... 3, 4, 13

Skinner v. Railway Labor Executives' Ass'n, ___ U.S. ___, 109 S.Ct. 1402 (1989)..... 4

South Dakota v. Neville, 459 U.S. 553 (1983) .. 8

South Dakota v. Opperman, 428 U.S. 364 (1976) 3

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 6

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 2, 3, 6, 7 14, 15, 17

Sitz v. State Police, 170 Mich. App. 433, 429 N.W. 2d 180 (1988)..... 5

OTHER

Andenaes, J., The Scandinavian Experience — Social Control of the Drinking Driver (M. Lawrence, J. Snortum & F. Zimring, ed. 1988)..... 11

Homel, R., Policing the Drinking Driver: Random Breath Testing and the Process of Deterrence (Sydney, Australia: Federal Office of Road Safety 1986)..... 11, 13

Lacy, J., J. Steward, L. Marchetti, D. Oiojubm, P. Murphy, R. Lucke & R. Jones, Enforcement and Public Information Strategies for DWI General Deterrence: Arrest Drunk Driving — The Clearwater and Largo, Florida Experience (National Highway Traffic Safety Administration Report No. DOT-HS-807-066 1986) ... 11

LaFave, W., Search & Seisure: A Treatise on the Fourth Amendment. (2d Ed. 1987)..... 13

Levy, D., D. Shea, & P. Asch, Traffic Safety Effects of Sobriety Checkpoints and Other Local DWI Programs in New Jersey, 79 American Journal of Public Health 3 (March 1989)..... 11

National Commission Against Drunk Driving, Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving (1987)..... 8

National Commission Against Drunk Driving, Report on the Youth Impaired Driving Public Hearings (1988) 8

National Transportation Safety Board, Safety Study — Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations (Report No. NTSB/55-84/01 1984) 11

Oates, J., Jr., Factors Influencing Arrests for Alcohol-Related Traffic Violations (National Highway Traffic Safety Administration, Technical Report No. DOT-HS-801-201 1974) 14

Statement by Surgeon General C. Everett Koop, M.D., Sc.D., releasing Proceedings of Surgeon General's Workshop on Drunk Driving (May 31, 1989)..... 9

U.S. Dept. of Health and Human Services, Proceedings of Surgeon General's Workshop on Drunk Driving (1989) 8

Voas, R.B., A. Rhodenizer, Jr. & C. Lynn, Evaluation of Charlottesville Checkpoint Operation: Final Report (National Highway Transportation Safety Administration, Technical Report No. DOT-HS-806-989 1985)..... 11

Williams, A. and A. Lund, Deterrent Effect on Roadblocks on Drinking and Driving, Traffic Safety Evaluation Research Review 3:7-18 (1984) 12

INTEREST OF THE AMICI CURIAE

Amicus American Alliance for Rights and Responsibilities (Alliance) is a District of Columbia non-profit corporation, founded to promote a healthy balance between individual rights and civic responsibilities. It regards the incidence of drunk driving on American roads as a leading example of the pursuit of individual wants without regard to the consequences for others or for the society as a whole. Therefore, the Alliance works to support the efforts of citizens' groups, voluntary associations, and government agencies to reduce drunk driving.

Remove Intoxicated Drivers, Inc. (RID-USA) is the oldest anti- "driving while intoxicated" national organization in the country with 136 chapters operating in 36 states. RID-USA's goals are to deter drunk driving, help DWI victims, educate the public, and monitor and evaluate the laws and programs put into place to deter drunk driving.

Dr. C. Everett Koop, M.D., the 13th Surgeon General of the U.S. Public Health Service (retired) holds a leadership role in promoting issues of vital concern to the public health. Dr. Koop advocates and has supported a comprehensive and systematic approach to deter the incidence of drunk driving and to reduce the carnage caused by drunk driving on American highways. Traffic sobriety checkpoints are an integral component in Dr. Koop's strategy to save lives lost to drunk driving.

The interest of *amici curiae* in proposing that this Court reverse the decision of the Michigan Court of Appeals is different than that of the Attorney General of Michigan. *Amici* are involved with this issue nationwide, and advocate traffic sobriety checkpoints as part of a coordinated, multi-faceted effort to reduce drunk driving. *Amicus* AARR is concerned that an adverse ruling in this case would undermine efforts around the country to restore the sense of mutual obligation and civic responsibility so essential to freedom in our democracy.

SUMMARY OF ARGUMENT

The decision of the court below finding Michigan's use of traffic sobriety checkpoints unconstitutional should be reversed since the state's program provides an effective tool in deterring and apprehending drunk drivers while fully safeguarding the Fourth Amendment interests of motorists. In *United States v. Martinez-Fuerte* 428 U.S. 543 (1976), this Court upheld the use of traffic checkpoints by immigration agents because the enforcement tool eliminated arbitrary discretion by the officer in the field, avoided fright and surprise on the part of motorists, and effectuated a compelling public interest. In this case, sobriety checkpoints possess the same safeguards and effectuate an equally, if not more compelling public interest. *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) (App. 133a-163a)

The court below acknowledged the state's compelling interest in combatting drunk driving, but unreasonably limited the state's ability to mount a systematic and comprehensive attack. The lower court also ignored that the efficacy of sobriety checkpoints as a valuable deterrent mechanism has been established and advocated by a broad range of experts as well as other jurisdictions with substantial experience in this area.

Ultimately, the lower court's decision rests on the mistaken premise that no intrusion into Fourth Amendment interests, however slight, can be justified by short-term deterrence. The court's rejection of short-term deterrence as a legitimate and valuable goal in the state's program is contrary to this Court's decisions and counter to the state's comprehensive systematic strategy.

ARGUMENT

MICHIGAN'S EFFECTIVE USE OF SOBRIETY CHECKPOINTS IS CONSTITUTIONAL SINCE THE BRIEF INTERRUPTION OF INDIVIDUAL MOBILITY IS FAR OUTWEIGHED BY THE STATE'S COMPELLING INTEREST IN DETERRING AND APPREHENDING DRUNK DRIVERS

The Fourth Amendment, made applicable to the actions of state law enforcement officials through the operation of the Fourteenth Amendment, is, without dispute, a critical benchmark against which our freedoms and liberties are preserved and guaranteed. However, this Court has long recognized that:

> The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals'. *United States v. Martinez-Fuerte*, 428 U.S. 543, 544 (1976).

I.N.S. v. Delgado, 466 U.S. 210, 215 (1984).[1] Thus, "[t]he touchstone of [the Court's] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security' " *Commonwealth v. Mimms*, 434 U.S. 106, 108–109 (1977).

In recent decisions, the Court has "reaffirm[ed] the long standing principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance". *National Treasury Employees Union v. Von Raab*,

---

[1] Additionally, "[t]his Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment, [finding that] the expectation of privacy with respect to one's automobile is signifcantly less than relating to one's home or office". *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

—, U.S. —, 109 S.Ct. 1384, 1390 (1989); *Skinner v. Railway Labor Executives' Ass'n*, — U.S. — 109 S.Ct. 1402 (1989). Moreover, the Court has recognized that "the traditional probable cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the government seeks to *prevent* the development of hazardous conditions . . . ." *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1391–92 (citations omitted). In such situations, "the permissibility of a particular law enforcement practice is judged by balancing its instrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests". *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

Respondents' decision to oppose checkpoints arises from a view of individual rights as absolute and disconnected from responsibilities. *Amici* contend that such views are not sustainable in our increasingly complex and interdependent society; assertions of rights must be associated with correlative obligations.

Some enhancements of freedom can be purchased only with the coin of mutual restraint. The right to drive unfettered, which Respondents here defend, is in fact connected to a long list of duties: drivers must pass tests, subject themselves to periodic vision checks, inform authorities of address changes, register and take their cars for emissions and roadworthiness checks, and (in many states) purchase liability insurance. These are not restrictions on rights, but rather liberty enhancing obligations.

Seen in this light, this case amounts to a contest between those who view the brief stop caused by sobriety checkpoints as intrusive invasions of individual freedom and those who view them as but a minor inconvenience associated with their duties as driver-citizens, which they are glad to bear. The question is whether the Fourth Amendment should prevent a majority of citizens, acting through representative government, from creating such a modest obligation in service of the freedom to drive the nation's roadways in safety, without fear of mayhem at the hands of drunk drivers.

A. The Court Below Has Misapplied Governing Fourth Amendment Principles In Holding That Sobriety Checkpoints Are Unconstitutional

The court below affirmed the trial court's order enjoining the state from implementing its traffic sobriety checkpoint program. In reaching this conclusion, the court misapplied governing Fourth Amendment principles and misconstrued the test for determining the *effectiveness* of traffic sobriety checkpoints; that is, "the degree to which the seizure advances the public interest". *Brown v. Texas*, 443 U.S. 47, 50–51 (1979).

In holding that the use of sobriety checkpoints by law enforcement officials violates the Fourth Amendment, the Michigan Court of Appeals adopted the trial court's finding that "checkpoint programs were not an effective means for achieving actual arrests". *Sitz v. State Police*, 170 Mich. App. 433, 442, 429 N.W.2d 180, 183, (1988). In so ruling, the court acknowledged that sobriety checkpoints can provide a short-term deterrent effect, but the court rejected short-term deterrence as a legitimate goal of the state's effort to combat drunk driving. *Id.* at 442–443. The court's rejection of short-term deterrence as a legitimate goal of the state's efforts to eliminate drunk driving reflects a naive and dangerous under estimation of the problem and miscontrues this Court's governing decisions.

In *Brown v. Texas*, this Court identified the factors to be weighed in assessing the constitutionality of seizures which are not based upon individualized suspicion:

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

443 U.S. at 51-52. Utilizing this test, the Court held in *Brown v. Texas* that a police officer's action in *arbitrarily* stopping a pedestrian to ascertain his identity was unconstitutional because, under the facts presented there, "the balance between the public interest and [the individual's] right to personal security and privacy, tilts in favor of freedom from police interference". 443 U.S. at 52.

In articulating this balancing test in *Brown v. Texas*, the Court implicitly acknowledged that under appropriate facts the balance between the public interest and an individual's Fourth Amendment rights may 'tilt in favor of police interference' even in the absence of individualized suspicion. This acknowledgment, implicit in *Brown v. Texas*, is also apparent in the Court's decision in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). There the Court held that border patrol agents conducting roving patrols could not *randomly* stop vehicles to check for illegal aliens because the agents discretion as to which cars to stop was unlimited. 442 U.S. at 880-81.

In *Delaware v. Prouse*, 440 U.S. 648 (1979), although the Court again struck down as unconstitutional a *random* stop by a roving patrol officer, the Court expressly recognized that the "reasonableness standard" of the Fourth Amendment may be satisfied by some safeguard other than "individualized suspicion". 440 U.S. at 654-55.

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), additional safeguards were established to permit the stopping of motorists at permanent checkpoints without any individualized suspicion. Although the "objective" elements of the intrusion, "the stop, itself, the questioning, and the visual inspection" existed in both the roving patrol and checkpoint situations, *Id.* at 558, the Court found the checkpoint far less intrusive:

> [W]e view checkpoint stops in a different light because the subjective intrusion — the generating of concern or even fright on the part of lawful travelers — is appreciably less in the case of a checkpoint stop . . . [C]heckpoints both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to the law abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions . . . And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving patrol stops.

Id. at 558-59. In upholding the use of permanent checkpoints in *United States v. Martinez-Fuerte*, the Court balanced the minimal intrusion into individual privacy and liberty against the state's substantial interest in deterring and apprehending illegal aliens. The Court concluded that the checkpoints were an effective and constitutional tool in furthering the state's efforts.

Under this analysis, Michigan's use of sobriety checkpoints similarly serves the state's compelling interest in both deterring and apprehending drunk drivers, a public interest which far outweighs the brief interruption of individual mobility.

B. The Devastating Consequences Of Drunk Driving Are Well Documented And Compelling

> An average of two to three of our fellow citizens are killed on our streets and highways every hour, around the clock, because they or others had their judgment and reflexes impaired by alcohol and other drugs . . . When the vehicular wreckage is towed away, the *human* wreckage is left behind —the permanent brain damage, the spinal cord injuries, the lost or permanently deformed limbs, the blindness, and the impotence — the lifetimes crippled with disability and haunted by recurrent nightmares of how it all happened. Tens of thousands of deaths, hundreds of thousands of injuries. Those are numbing statistics, but they are also *more than* just statistics. They are real people, real human lives.

U.S. Dept. of Health and Human Services, Proceedings of Surgeon General's Workshop on Drunk Driving (hereinafter "*Proceedings*") at 6 (1989). This Court has previously taken judicial notice of "[t]he carnage caused by drunk drivers", *South Dakota v. Neville*, 459 U.S. 553, 558 (1983), and has acknowledged that "[t]he increasing slaughter on our highways, most of which should be avoided, now reaches the astounding figures only heard of on the battlefield". *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957).

While the Respondents understandably may seek to concede summarily the devastating proportions of the carnage and move quickly to a pristine analysis of the Fourth Amendment, the magnitude of this American tragedy demands more than a summary acknowledgment. "Traffic crashes are the greatest single cause of death for people between 5 and 35. More than half of these fatalities are alcohol-related". National Commission Against Drunk Driving, Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving (1987). "One in five American youths who dies between the ages of 15 and 20 will die in an alcohol-related crash. As it has often been remarked, the alcohol-related crash is the American way to die for teenagers of driving age." National Commission Against Drunk Driving, Report on the Youth Impaired Driving Public Hearings (hereinafter "Commission Report on Youth Impaired Driving") at 1 (1988). The loss of life at this magnitude demands more than the outrage of the families victimized; our communities are equally devastated by the untold contributions forever lost with each death.

C. Sobriety Checkpoints Are An Effective Component In The State's Comprehensive, Systematic Approach To Deter And Apprehend Drunk Drivers

The Michigan program was the result of a serious effort by the state's executive branch to respond to growing public concern over drunk driving. After consulting with experts, reviewing the best available evidence and considering the

input of a broadly representative citizen's panel, the conclusion of Michigan's executive branch was that sobriety checkpoints are an effective method to deter drunk driving directly by increasing the public's perception of the risk of arrest and by reinforcing the educational messages being delivered. This same conclusion has emerged from virtually every authoritative national organization or institution which has been charged with the responsibility to recommend measures to reduce the carnage from drunk driving.

Experience has demonstrated that there is no *one* solution to the problem of drunk driving. The Law Enforcement Panel of the Surgeon General's Workshop on Drunk Driving recognized the need for a systematic and comprehensive approach to battle drunk driving in recommending that sobriety checkpoints be implemented and expanded in all jurisdictions.[2] *Proceedings* at 53.

In supporting the use of sobriety checkpoints, the Panel acknowledged that:

> Driving Under the Influence (DUI) enforcement is a short-term control over a much more fundamental problem — public attitudes towards alcohol abuse. This public health problem must be addressed in the long range by effective education programs beginning in our primary schools and extending to adult programs, mass media, advertising, and regulation. This will require a concerted and cooperative effort among agencies concerned with health, education, transportation, commerce, and the administration of justice. *Enforcement can con-*

[2] The Surgeon General's Workshop on Drunk Driving (December 1988), co-sponsored by five Federal Departments — Defense, Education, Justice, Health and Services, and Transportation — was led by the Surgeon General, the Secretary of Health and Human Services, and the Associate Administrator for Traffic Safety Programs of the National Highway Traffic Safety Administration. Participants included 112 pertinent experts from the legal, scientific, and medical fields.

tribute to this longer range process through well-publicized programs enforcing community standards regarding drinking and driving.

Id. at 51 (emphasis added). In directing the *Proceedings* to Congress for action, then Surgeon General C. Everett Koop specifically endorsed "10 key summary recommendations because collectively they have the potential for saving thousands of lives". Of the 200 plus recommendations of the Workshop, one of the 10 specifically highlighted and endorsed by the Surgeon General was the Law Enforcement Panel's recommendation for the states to implement and increase their utilization of sobriety checkpoints. Statement by Surgeon General C. Everett Koop, M.D., Sc.D., releasing Proceedings of Surgeon General's Workshop on Drunk Driving (May 31, 1988).

The findings and recommendations of the National Commission Against Drunk Driving similarly support the use of sobriety checkpoints as one component in a systematic and comprehensive approach to deter and apprehend drunk drivers. *Commission Report on Youth Impaired Driving* at 35.

The recommendations set forth in the Surgeon General's *Proceedings* and the *Commission Report on Youth Impaired Driving* are fully consistent with the conclusions of the National Transportation Safety Board. In its 1984 study of sobriety checkpoints, the National Transportation Safety Board found that:

> state and local programs that focus primarily on those relatively few drunk drivers who have been apprehended, as opposed to programs designed to deter the vast majority of offenders who are never caught, are not likely to achieve significant results.

National Transportation Safety Board, Safety Study — Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations (hereinafter "*NTSB Sobriety Checkpoint Study*") (Report No. NTSB/SS-84/01 1984) at 3. "Based upon its review of the current literature and

recent experience in national and international efforts to control drunk driving", the National Transportation Safety Board concluded "that general deterrence programs afford the most promising approach for the short term reduction in alcohol-related deaths and injuries on our highways." *Id.* at 20. The Report recommended that Michigan and other states which had not yet implemented sobriety checkpoints, "[i]nstitute the use of sobriety checkpoints on a periodic and continuing basis . . . as part of a comprehensive Driving While Intoxicated enforcement program." *Id.* at 20–21.

Even though checkpoints are relatively new as applied to drunk driving in the United States, the technique has a longer history in European countries, particularly in Scandinavia, and studies both here and in other countires unfailingly demonstrate that checkpoints increase public awareness of drunk driving and its dangers.[3] For example, in Charlottesville, Virginia, after less than a year of operation, over 90 percent of all nighttime drivers were aware that checkpoints were in use, and fully 40 percent believed that their own likelihood of being caught if drunk had been increased as a result. R.B. Voas, A. Rhodenizer, Jr., and C. Lynn, Evaluation of Charlottesville Checkpoint Operation: Final Report (NHTSA Technical Report No. DOT-HS-806-989 1985) at 27–28. The experience in Maryland was similar. There, drivers in Mont-

---

[3] See, e.g., J. Andenaes, The Scandinavian Experience — Social Control of the Drinking Driver (M. Laurence, J. Snortum, and F. Zimring, eds. 1988) at 43–63. See, also, R. Homel, Policing the Drinking Driver: Random Breath Testing and the Process of Deterrence (Sydney, Australia: Federal Office of Road Safety 1986); D. Levy, D. Shea, and P. Asch, Traffic Safety Effects of Sobriety Checkpoints and Other Local DWI Programs in New Jersey, 79 American Journal of Public Health 3 (March 1989); J. Lacy, J. Steward, L. Marchetti, D. Oiojubm, P. Murphy, R. Lucke, and R. Jones, Enforcement and Public Information Strategies for DWI General Deterrence: Arrest Drunk Driving — The Clearwater and Largo, Florida Experience. (National Highway Transportation Safety Administration Report Mo. DOT-HS-807-066 1986).

gomery County, where checkpoints were in use, perceived a higher likelihood of apprehension that did drivers in nearby Fairfax County, Virginia, where intensive patrolling was used. A.F. Williams and A.K. Lund, Deterrent Effect of Roadblocks on Drinking and Driving, Traffic Safety Evaluation Research Review 3:7–18 (1984).

Respondents' expert in the trial below, Dr. H. Laurence Ross, conceded that checkpoints and the surrounding publicity can deter drunk driving. His criticism, adopted by the lower court, was that the beneficial effect would be short term. (TR. at 29–30). New Jersey is, perhaps, the prototypical example of Dr. Ross' predictions in operation. Its short-term checkpoint program peaked in the second year and declined in effectiveness gradually thereafter. In the interim, however, nighttime single vehicle crashes declined by ten to fifteen percent, and the impact was greater and longer lasting than other competing programs. D. Levy, *supra*, note 3.[4]

In rejecting short term deterrence as a sufficient basis to justify the state's use of sobriety checkpoints, the court below does not take into account this substantial body of research and documented experience. Moreover, the court below entirely ignores the demonstrated need for a systematic and comprehensive approach to drunk driving which incorporates both short-term *and* long-term deterrence mechanisms. By simplistically assessing the efficacy of sobriety checkpoints solely on the basis of arrests made, the lower court fails to value the importance of short-term deterrence mechanisms in a comprehensive approach to the problem of drunk driving.

---

[4] *Amici* may be more optimistic than the lower court and Dr. Ross about our capacity to inspire a greater sense of civic responsibility and voluntary restraint among American drivers. However, even accepting the more pessimistic view adopted by the court below that the deterrent effect of checkpoints as administered in Michigan would be short term, a "few months or years" of "diminish[ed] fatal crashes" is a formidable achievement.

The court also fails to realize that the success of sobriety checkpoints is better measured by the number of sober drivers passed through checkpoints after only a momentary interruption, not by the number of drunk drivers arrested. Cf. *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1395-96 n.3 ("When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success"). See generally W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (2d Ed. 1987), § 10.8 (d) ("[B]ecause a checkpoint operation is much less intrusive and threatening than a system of random stops, it does not require nearly as strong a showing of likely 'success' in the sense of stop/apprehension percentages").

Although *amici* do not agree that arrest rates and long-term deterrence are the relevant criteria by which to judge the efficacy of sobriety checkpoints, even by this measure there is compelling evidence that checkpoints are effective if aggressively pursued. For example, in New South Wales, Australia, nearly one million stops were made on a driving population of three million in the first year of a checkpoint program. Monthly fatalities from drunk driving decreased by 23 percent beginning in 1982 and decreases continued thereafter. R. Homel, Policing the Drinking Driver: Random Breath Testing and the Process of Deterrence (Sydney, Australia: Federal Office of Road Safety 1986).

Implicit in the lower court's rejection of sobriety checkpoints is the assumption that the state will not conduct checkpoints with sufficient frequency to make a similar, long term and substantial impact. Of course, by virtue of the lower court's ruling that checkpoints are unconstitutional, the state shall never have the opportunity to implement checkpoints at a level where their documented short term deterrence effect may be translated into even more substantial long term benefits.

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the defendants argued that the government's use of permanent checkpoints to deter and apprehend illegal aliens should be held unconstitutional because the government had less restrictive enforcement mechanisms at its disposal. In rejecting the defendants argument, the Court found that:

> [t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers. In any event, these arguments tend to go to the general proposition that all traffic-checking procedures are impermissible, a premise our previous cases reject.

428 U.S. at 556, n. 12.

In this case, the Respondents seek to erect a similarly insuperable barrier, forever blocking the state's efforts to mount an effective, comprehensive and systematic attack on the drunk driving problem. Not only is the lower court's insistence upon a "less-restrictive-alternative" contrary to this Court's prior holdings, the argument ignores that in many respects sobriety checkpoints are the least intrusive method of combatting drunk driving.[5]

Given the substantial evidence that sobriety checkpoints do provide a genuine deterrent to drunk driving, their constitutionality is dependent upon the balancing of the state's compelling interest in deterring drunk driving against the severity of the intrusion caused by the checkpoints. As demonstrated below, the intrusion is *de minimus* and the consti-

[5] There is considerable evidence that discrimination by an officer patrolling in the traditional style is not just a potential; it happens. There is also reasonably good evidence of the demographic profile of persons involved in alcohol related crashes and of the persons arrested. Teenagers and people with high status tend to be underrepresented in the arrested population, and low status people tend to be overrepresented. J. Oates, Jr., Factors Influencing Arrests for Alcohol-Related Traffic Violations (National Highway Traffic Safety Administration, Technical Report No. DOT-HS-801-230 1974).

tutional balance, accordingly, falls squarely in favor of public safety.

D. Sobriety Checkpoints Impose No More Than A *De Minimus* Intrusion Upon Liberty Interests

In upholding the constitutionalitty of traffic checkpoints in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court determined that the intrusion upon individual mobility was not substantial because the brief stops were designed to eliminate the arbitrary exercise of discretion and avoid the element of fright and surprise. The constitutional safeguards present in *United States v. Martinez-Fuerte* are each incorporated in the state's written Sobriety Checkpoint Guidelines (App. 133a–163a). For instance, to eliminate the element of fright and surprise found in roving patrols and to insure the checkpoints present a "regulated and duly authorized" appearance to on-coming motorists, "warning signs, flares, cones and/or emergency lighting equipment [are] utilized and conspicuoulsy displayed to provide advance notice of the impending stop." (App. 153a). Discretion in the field is eliminated by the criteria and procedures established for selecting the location of each checkpoint. Under the state's written guidelines, checkpoint locations are selected on the basis of data reflecting "previous alcohol and drug experience per time of time and day of week", as determined by arrests and accidents (App. 148a–154a).

Although the sobriety checkpoints are not "permanent", as were the border patrol checkpoints in *Martinez-Fuerte*, "their use is widely publicized to enhance the desired deterrent effect among drunk drivers." (App. 152a). Moreover, the sobriety checkpoints provide one additional safeguard. Motorists, upon approaching the checkpoint, are not required to continue through the checkpoint; if they choose, they can turn off the road or turn around. (App. 156a) (TR. 99–100). Under the state's guidelines, a motorist avoiding the checkpoint in this manner will only be stopped "[i]f it appears

from the driving behavior that the driver may possibly be intoxicated." (App. 156a). The opportunity to detour and avoid the temporary sobriety checkpoint provides equivalent protection to the "permanence" of the border patrol checkpoint, which motorists may plan in advance to detour. Indeed, given the Court's recent decision in *I.N.S. v. Delgado* 466 U.S. 210 (1984), it may be questionable whether the brief and largely voluntary interruption in the motorist's continued passage even constitutes a seizure under the Fourth Amendment.

In *I.N.S. v. Delgado*, the Court held that factory workers who were briefly interrogated about their citizenship by immigration agents while other agents stood at the factory exits, were not "seized" under the Fourth Amendment. In so ruling, the Court found that there was no evidence that workers were not free to move about and no evidence that they would be detained if they attempted to leave. Although the plaintiffs complained that they felt compelled, at least subjectively, to submit to the agent's questioning, the Court found that simply because "citizens will respond to a police request, the fact that people do so, and do so without being told that they are free not to respond, hardly eliminates the consensual nature of the response." 466 U.S. at 216.

Motorists approaching the state's sobriety checkpoints have similar freedoms. As explained by Director Hough at trial:

> The driver[s] . . . may approach the lane to turn around and not enter if they so desire. If they do enter the lane and stop at one of the check stations and do not wish to talk with the officer or even roll their window down, the officer will do the best they can under the circumstances . . . They will try to observe the person and make some determination as far as intoxication. If they see none, they will pass them on through.

(TR. 98–99). The element of voluntariness in the state's sobriety checkpoint program is an additional safeguard not present in the permanent border patrol checkpoints upheld by this

Court. Thus, the instrusiveness of the state's sobriety checkpoint, if it exists at all, is clearly *de minimus*. The fact that checkpoint stops have "a long history evidencing [their] utility and [are] accepted by motorist as incident to highway use," *United States v. Martinez-Fuerte*, 428 U.S. at 560 n. 14, further 'tilts the balance' in favor of public safety.

As demonstrated by the analysis above, the state's sobriety checkpoint program strikes the appropriate balance between the public's compelling interest in deterring and apprehending drunk drivers and the individual's Fourth Amendment interests.

As in any controversy involving the use of the state's police powers, the specter of the dreaded "police state" has been raised; the fear that if we permit the police to set up sobriety checkpoints, even under such narrowly limited conditions as in Michigan, and even in order to incontrovertibly "promote the general welfare" by improving the safety of public roads, we may loose our footing and swiftly slide down the proverbial "slippery slope" into the abyss of police dictatorship. Although *amici* share the concern that we need to be vigilant against unreasonable expansions in police authority, such fears are unfounded in this case because the state's use of sobriety checkpoints is secured firmly by established safeguards, the strength of which comfortably sustain the state's program.

CONCLUSION

For all the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

RICHARD A. ROSSMAN
Counsel of Record

ABRAHAM SINGER
JAYNE F. CUCCHIARA
PEPPER, HAMILTON & SCHEETZ
100 Renaissance Center
36th Floor
Detroit, Michigan 48243
(313) 259-7110
Counsel for Movants

No. 88-1897

In The
Supreme Court of the United States
OCTOBER TERM 1989

MICHIGAN DEPARTMENT OF STATE POLICE and
COL. R.T. DAVIS, Director of the Michigan
Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW AND JACK WELBORN,
Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

MICHELLE A. MASON, being first duly sworn, deposes and says:

I am employed by the law firm of Pepper, Hamilton & Scheetz.

On the 15th day of November, 1989, I served a copy of the Motion of American Alliance for Rights and Responsibilities, Inc., Remove Intoxicated Drivers, Inc., and Dr. C. Everett Koop, M.D. For Leave To File a Brief *Amici Curiae* and Brief *Amici Curiae* Supporting Reversal, via United States mail, postage prepaid on:

LOUIS J. CARUSO
Solicitor General
Counsel of Record
525 West Ottawa St.
Lansing, MI 48913

THOMAS L. CASEY
Assistant Solicitor General
525 West Ottawa St.
Lansing, MI 48913

FRANK J. KELLEY
Attorney General
PATRICK J. O'BRIEN
Assistant Attorney General
Law Building
525 West Ottawa St.
Lansing, MI 48913

MARK GRANZOTTO
Counsel of Record
One Kennedy Square, #2204
Detroit, MI 48226

DEBORAH L. GORDON
Attorney for Respondents
1600 Ford Building
Detroit, MI 48226

WILLIAM C. GAGE
Attorney for Respondents
1818 Buhl Building
Detroit, MI 48226

I am competent and able to testify to the statements contained herein if called upon to do so in a court of law.

Michelle A. Mason

MICHELLE A. MASON

Subscribed and sworn to before me
this 1st day of November, 1989

Tina M. Rose

Notary Public, Wayne County
Michigan

TINA M. ROSE
Notary Public, Wayne County, MI
My Commission Expires Oct. 28, 1991

MOTION FILED
NOV 16 1989

No. 88-1897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE
and COL. R. T. DAVIS, Director of the
Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW and JACK WELBORN,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND VIRGINIA COALITION AGAINST DRUNK DRIVING AS *AMICI CURIAE*

RICHARD K. WILLARD *
DALE C. ANDREWS
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240
Attorneys for Amici Curiae

Date: November 16, 1989 * Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1897

MICHIGAN DEPARTMENT OF STATE POLICE
and COL. R. T. DAVIS, Director of the
Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW and JACK WELBORN,
Respondents.

**On Writ of Certiorari to the
Michigan Court of Appeals**

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AND VIRGINIA COALITION AGAINST DRUNK DRIVING AS *AMICI CURIAE*

Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of respondents' counsel to provide consent.

The Washington Legal Foundation (WLF) is a national non-profit law and policy center with more than 120,000 members and supporters nationwide. WLF engages in litigation and participates in the administrative

process in a variety of areas and devotes a substantial amount of its resources to promoting victims' rights and criminal justice reform.

Over the last 10 years, WLF has appeared as *amicus curiae* in numerous cases before this Court and lower federal courts that relate to the issue before the Court in the instant case. *See, e.g., National Treasury Employees Union v. Von Raab*, —— U.S. ——, 109 S. Ct. 1384 (1989). In addition, WLF participated as a member of the Surgeon General's Workshop on Drunk Driving as a member of the Judicial and Administrative Processes panel. *See* U.S. Dep't of Health and Human Services, *Surgeon General's Workshop on Drunk Driving: Proceedings* (Dec. 14-16, 1988).

The Virginia Coalition Against Drunk Driving (VCADD) is a coalition of civic action groups concerned with the continuing threat to public safety caused by alcohol-impaired drivers. The organizations and groups that make up VCADD include Virginians Opposing Drunk Driving (VODD), with some nine chapters throughout the Commonwealth; the various local chapters of Mothers Against Drunk Driving (MADD); the American Automobile Association of Virginia; and numerous county and regional task forces against alcohol and drug abuse.

In recent years, VCADD and its members have repeatedly urged the Virginia legislature to enact meaningful drunk-driving laws and provide state and local law enforcement officials with the necessary tools to enforce those laws. Although much remains to be done, great strides have been made in raising the public awareness of the death and destruction caused by drunk drivers. One of the most important tools in this battle has been the widespread use of sobriety checkpoints in high risk areas. If the decision of the Michigan court is affirmed, VCADD (and the citizens of Virginia) will be adversely affected by the loss of one of the most effective tools for raising public awareness of the battle against drunk driving. Accordingly, the *amicus* has a strong interest in the outcome of this case.

For the foregoing reasons, *amici curiae* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*. *Amici* are in a unique position to aid the Court in its consideration of the issues presented. The interests of *amici* are direct and substantial. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear.

Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of petitioner be granted.

Respectfully submitted,

RICHARD K. WILLARD *
DALE C. ANDREWS
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

Attorneys for Amici Curiae

Date: November 16, 1989

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. SOBRIETY CHECKPOINTS ARE A NECESSARY WEAPON IN THE WAR AGAINST DRUNK DRIVING	3
A. One of the Most Serious Problems Facing the American Public Is Drunk Driving	3
B. Sobriety Checkpoints Have Proven Their Worth In the War Against Drunk Driving	6
II. SOBRIETY CHECKPOINTS ARE CONSTITUTIONAL	15
A. Sobriety Checkpoints Are Valid As Reasonable Conditions of Access to Public Highways	15
1. Sobriety Checkpoints Are Closely Related to Highway Safety And Thus Should Be Evaluated Differently From General Law Enforcement Searches and Seizures	15
2. Sobriety Checkpoints Are Analogous To Administrative Searches That Have Been Held to Comply with the Fourth Amendment	18
3. Sobriety Checkpoints Are Reasonable Because They Do Not Involve The Unconstrained Exercise of Discretion	20
B. Sobriety Checkpoints Are Also Valid Under This Court's Fourth Amendment Balancing Test As Applied To Checkpoints For General Law Enforcement	22

TABLE OF CONTENTS—Continued

	Page
1. Sobriety Checkpoints Are Minimally Intrusive And Are Supported By A Weighty Public Interest	22
2. The Validity Of Sobriety Checkpoints Does Not Hinge Upon Whether They Can Be Shown To Be The Least Intrusive Or Most Effective Means Of Drunk Driving Control	24
3. The "Fear And Surprise" Standard Applied By The Court Below Is Without A Factual Basis	25
C. The Fourth Amendment Does Not Authorize The Judiciary to Engage in Detailed Oversight of Public Policymaking As To Sobriety Checkpoints	27
CONCLUSION	29

TABLE OF AUTHORITIES

CASES:	Page
Arizona v. Hicks, 480 U.S. 321 (1987)	17
Arkansas v. Sanders, 442 U.S. 753 (1979)	19
Brown v. Texas, 443 U.S. 47 (1979)	15, 22
Cady v. Dombrowski, 413 U.S. 433 (1973)	25
Commonwealth v. Shields, 402 Mass. 162, 521 N.E.2d 987 (1988)	24
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	17
Delaware v. Prouse, 440 U.S. 648 (1979)	2, 17, 19, 20-21, 25
Donovan v. Dewey, 452 U.S. 594 (1981)	19
Illinois v. Lafayette, 462 U.S. 640 (1983)	25
Ingersoll v. Palmer, 241 Cal. Rptr. 42, 43 Cal. 3d 1321, 743 P.2d 1299 (1987)	20
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)	19
McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978)	18
National Treasury Employees Union v. Von Raab, —— U.S. ——, 109 S. Ct. 1384 (1989)	18, 25
New York v. Burger, 482 U.S. 691 (1987)	2, 19-20
People v. Bartley, 93 Ill. Dec. 347, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 467 U.S. 1068 (1986)	9, 24
Seattle v. Mesiani, 110 Wash. 2d 454, 755 P.2d 775 (1988)	24
Shapiro v. State, 390 So.2d 344 (Fla. 1980), *cert. denied*, 450 U.S. 982 (1981)	18
Sitz v. Michigan Dep't of State Police, No. 86-613-063-C2 (Wayne County 3d Jud. Cir. July 26, 1986)	4, 12, 21, 25-26
Sitz v. Department of State Police, 170 Mich. App. 433, 429 N.W.2d 180 (1988)	*passim*
Skinner v. Railway Labor Executives' Ass'n, —— U.S. ——, 109 S. Ct. 1402 (1989)	2, 25
Solorio v. United States, —— U.S. ——, 107 S. Ct. 2924 (1987)	28
South Dakota v. Nelville, 459 U.S. 553 (1983)	4
South Dakota v. Opperman, 428 U.S. 364 (1978)	19
State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (1983)	2, 24, 27-28

TABLE OF AUTHORITIES—Continued

	Page
State v. Egan, 213 N.J. Super. 133, 516 A.2d 1115 (N.J. Super. Ct. App. Div. 1986)	27
State v. Garcia, 500 N.E.2d 158 (Ind. 1986), *cert. denied*, 481 U.S. 1014 (1987)	24
State v. Golden, 171 Ga. App. 27, 318 S.E.2d 693 (1984)	27
State v. Henderson, 114 Idaho 293, 756 P.2d 1057 (Idaho 1988)	24
State v. Koppel, 127 N.H. 286, 499 A.2d 977 (1985)	24
State v. Leighton, 551 A.2d 116 (Me. 1988)	24
State v. Muzik, 379 N.W.2d 599 (Minn. Ct. App. 1985)	24, 27
State v. Olgaard, 248 N.W.2d 392 (S.D. 1976)	27
State v. Smith, 674 P.2d 562 (Okla. Crim. App. 1984)	26
State v. Welch, 755 S.W.2d 624 (Mo. Ct. App. 1988)	24
Terry v. Ohio, 392 U.S. 1 (1968)	21
Texas v. Brown, 460 U.S. 730 (1983)	17, 20
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	2, 15, 16, 18
United States v. Haynie, 637 F.2d 227 (4th Cir. 1980), *cert. denied sub nom. Fletcher v. United States*, 451 U.S. 972 (1981)	18
United States v. Henry, 615 F.2d 1223 (9th Cir. 1980)	18
United States v. Herzbrun, 723 F.2d 773 (11th Cir. 1984)	18
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	2, 15, 16-17, 18, 25, 26
United States v. Ortiz, 422 U.S. 891 (1975)	16, 18, 26
United States v. Pulido-Baquerizo, 800 F.2d 899 (9th Cir. 1986)	18
United States v. Villamonte-Marquez, 462 U.S. 579 (1983)	25
Webb v. State, 739 S.W.2d 802 (Tex. Crim. App. 1987)	26

TABLE OF AUTHORITIES—Continued

STATUTES:	Page
23 U.S.C. § 402	11
23 U.S.C. § 408	11
REGULATIONS:	
23 C.F.R. § 1309.6(b)	11
ARTICLES AND BOOKS:	
Acker, *Social Sciences and the Criminal Law: A Report on America's War Against Drunk Driving*, 25 Crim. L. Bull. 376 (1989)	9, 10
Homel, Carseldine & Kearns, *Drunk-Driving Countermeasures in Australia*, 4 Alcohol, Drugs & Driving 113 (1988)	7, 13
Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. Davis L. Rev. 595 (1985)	5, 6-7, 8, 10, 12, 13
Jernigan & Mosher, *Preventing Alcohol-Related Motor Vehicle Crashes: A Policy Agenda for the Nation*, 14 Contemp. Drug Probs. 243 (1987)	4, 5, 6
4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (2d ed. 1987)	9
Levy, *Methodologies for the Evaluation of Local Traffic Safety Programs with an Application to New Jersey DWI Programs*, 11 Evaluation & Program Plan. 255 (1988)	7, 12
McAllister, *The Drunken Driving Crackdown: Is it Working?*, 74 A.B.A. J. 52 (Sept. 1988)	6
Note, *Clearing the Roadblocks to Sobriety Checkpoints*, 21 U. Mich. J.L. Ref. 489 (1988)	13
Ross, *Britain's Christmas Crusade Against Drinking and Driving*, 48 J. Studies On Alcohol 476 (1987)	7, 8, 12
Shore & Maguin, *Deterrence of Drinking-Driving: The Effect of Changes in the Kansas Driving Under the Influence Law*, 11 Evaluation & Program Plan. 245 (1988)	12-13

TABLE OF AUTHORITIES—Continued

Page

Snortum, *On Seeing the Forest and the Trees: The Need for Contextual Analysis in Evaluating Drunk Driving Policies*, 11 Evaluation & Program Plan. 279 (1988) 14

Williams & Lund, *Deterrent Effects of Checkpoints on Drinking and Driving*, 3 Traffic Safety Evaluation Research Rev. 7 (1984) 10

MISCELLANEOUS:

Alcohol Abuse Prevention Program for the Transportation Industry, 54 Fed. Reg. 46,326 (Nov. 2, 1989) 6, 8, 12

Lacey, *Enforcement and Public Information Strategies for DWI General Deterrence: ARREST DRUNK DRIVING—The Clearwater and Largo, Florida Experience*, U.S. Dep't of Transp. Final Report, DOT HS 807 066 (Dec. 1986) 13

Michigan State Police Sobriety Checkpoint Guidelines (1986), *reprinted in* Petition For Writ of Certiorari to the Michigan Court of Appeals, *Michigan Dep't of State Police v. Sitz*, No. 88-1897 (U.S. filed May 22, 1989) 21-22

National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* (Dec. 1987) 3, 6, 7, 12

National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* (Dec. 1986) 11, 12

Presidential Commission on Drunk Driving, *Final Report* (Nov. 1983) 3, 6, 14, 23

Voas, Rhodenizer & Lynn, *Evaluation of Charlottesville Checkpoint Operations*, U.S. Dep't of Transp. Final Report, DOT HS 806 989 (May 1985) 7, 11, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1897

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF FOR WASHINGTON LEGAL FOUNDATION AND VIRGINIA COALITION AGAINST DRUNK DRIVING AS *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

1. Over the past ten years, one-quarter of a million Americans have lost their lives in alcohol-related automobile crashes. These deaths were avoidable. Sobriety checkpoints are an important component of programs that have reduced the incidence of drunk driving and resulting loss of life. Programs that include checkpoints pre-

vent drunk driving more effectively than reliance on other law enforcement techniques, such as waiting to observe erratic driving behavior.

2. Sobriety checkpoints are valid under the Fourth Amendment as reasonable conditions of access to the publicly-funded highway system. Such checkpoints have a close nexus to the safe use of highways and thus should be analyzed in a different manner than searches or seizures undertaken for general law enforcement purposes. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 560 n. 14 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 n.8 (1975). Checkpoints do not involve the sort of unconstrained police discretion that this Court found objectionable in *Delaware v. Prouse*, 440 U.S. 648 (1979). The validity of sobriety checkpoints can also be sustained under the administrative search doctrine. *New York v. Burger*, 482 U.S. 691 (1987).

3. Even under the balancing test that this Court would apply to checkpoints for general law enforcement purposes, the program in question should be upheld. The burden on motorists is minimal, and sobriety checkpoints serve a substantial public interest in preventing drunk driving and the attendant loss of life. It is not legally required that checkpoints be the least intrusive or most efficient means of achieving this objective. *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402, 1419 n. 9 (1989). The Michigan Court of Appeals was also wrong to speculate about the "subjective intrusion" of such checkpoints in causing undue "fear and surprise" among motorists.

4. Once it is determined that sobriety checkpoints are reasonable techniques for promoting highway safety, there should be no continuing role for judicial supervision of the details of operating these programs. Some courts have held that the Fourth Amendment requires them to conduct in each case a painstaking review of numerous factors pertaining to checkpoint operation. *See, e.g., State v. Deskins*, 234 Kan. 529, 673 P.2d 1174, 1185 (1983). This sort of judicial intrusion into the details of checkpoint management places courts in a role for which they are not suited and discourages the proper use of checkpoints by inviting continual and burdensome litigation.

ARGUMENT

I. SOBRIETY CHECKPOINTS ARE A NECESSARY WEAPON IN THE WAR AGAINST DRUNK DRIVING

A. One of the Most Serious Problems Facing the American Public Is Drunk Driving

Drunken driving in America has fostered a national tragedy in which well over 20,000 people per year die needlessly in alcohol-related automobile accidents, and hundreds of thousands more are seriously injured.[1] In 1984, the Presidential Commission on Drunk Driving summarized the scope of the problem as follows:

> At least 50 percent of all highway deaths involve the irresponsible use of alcohol. Over the past 10 years, 250,000 Americans have tragically lost their lives in alcohol-related crashes. Conservative estimates place the annual economic loss at $21 billion, while others run as high as $24 billion. There is, of course, no way to measure the loss of human lives.
>
> In single vehicle fatal crashes, for which fault can be more easily ascertained than in multiple vehicle crashes, upwards of 65 percent of those drivers who died were legally under the influence, *i.e.*, their alcohol level was above 0.10.[2]

---

[1] *See* National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving*, at 5 (Dec. 1987).

[2] Presidential Commission on Drunk Driving, *Final Report*, at 1 (Nov. 1983).

Indeed, the actual impact of drunk driving may even be greater than that reported by the Presidential Commission. In this regard it has been noted that:

The problem of drunken driving has not escaped notice by this Court.[3] Indeed, even the Michigan trial court, in the course of striking the Michigan sobriety checkpoint law, held that the state's interest in controlling drunken driving was so clear as to require little analysis.[4]

These figures underestimate the extent of the problem. They are based solely on crashes reported to the police. The National Highway Traffic Safety Administration (NHTSA) estimates that there are twice as many unreported crashes as there are crashes reported. The figures include only those traffic crashes in which there were injuries or fatalities; there are no available estimates of property damage from alcohol-related collisions. Furthermore, many drivers in fatal crashes are simply never tested for [blood alcohol levels]. NHTSA estimates that only 42 percent of all drivers in fatal motor vehicle collisions, 63 percent of fatally injured drivers, and 23 percent of surviving drivers are tested, and that only 80 percent of the test results are ever actually reported.

Jernigan & Mosher, *Preventing Alcohol-Related Motor Vehicle Crashes: A Policy Agenda for the Nation*, 14 Contemp. Drug Probs. 243, 245 (1987) (footnotes omitted).

[3] In *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983), the Court stated:

> The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring) (footnote omitted) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-19 (1979) (recognizing the "compelling interest in highway safety").

[4] Petition for Writ of Certiorari to the Michigan Court of Appeals, Appendix, at 72a-74a, *Michigan Dep't of State Police v. Sitz*, No. 88-1897 (U.S. filed May 22, 1989) (hereinafter "Pet. App.").

This is, of course, true. But care must be taken that, in conceding the theoretical importance of combating drunk driving, and then moving on, we do not pass over too lightly, or perhaps ignore, the very personal horrors caused by drunk drivers on our nation's highways.

While some opponents of sobriety checkpoints prefer to characterize alcohol-related crashes as "accidents,"[5] that terminology is misleading. Deaths and injuries resulting from drunken driving "are preventable and are not the result of 'accidents' . . . ."[6] They are tragedies that need not and should not occur.

To come close to understanding the devastation that results when a preventable loss of life takes place at the hands of a drunken driver, a painful step beyond statistics and "conceding" the problem is required. The *Journal of the American Bar Association* described the May 14, 1988 crash, in which a drunk driver proceeding the wrong way on a dual lane highway hit a school bus containing 63 teenagers and four adults returning from a church-sponsored outing, as follows:

> The fuel tank of the bus ruptured and exploded in an orange fireball that shot from the front to the back of the bus. Flames engulfed the bus—"Not one part of it was untouched," Carroll County Coroner James Dunn told reporters, "inside, outside."
>
> Twenty-four teenagers and three adults died when they could not reach the rear exit. Their bodies were burned beyond recognition. Dental records were used because, as Kentucky State Medical Examiner Dr.

---

[5] *See, e.g.*, Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. Davis L. Rev. 595, 635 (1985) (footnotes omitted) (emphasis supplied) (contending that "only a small percentage of drivers are drunk at any given time and place, and only a small subset of these drunk drivers are involved in *accidents* causing death or injuries").

[6] *Jernigan & Mosher*, *supra* note 2, at 244.

George Nichols told family members, he did not want the families to see the charred remains.

"The picture . . . of their children in that room," he explained to reporters later, "is not what they have in their memories or wallets."[7]

It is in this context which the sobriety checkpoint procedures of Michigan and of other states must be judged. As shown in the next section of this brief, sobriety checkpoints time and again have proven themselves to be an invaluable and minimally intrusive component of comprehensive prevention strategies aimed at minimizing the occurrence of alcohol-related automobile tragedies.

B. Sobriety Checkpoints Have Proven Their Worth In the War Against Drunk Driving

If there is one thing that is agreed among social scientists in the vanguard of the battle against drunken driving it is that there is no one solution to the problem. Rather, minimizing the presence of drunk drivers on America's highways requires a systemic approach.[8] But it is also virtually uniformly agreed that sobriety checkpoints have been an important component of programs that have achieved measurable success in keeping drunk drivers off of the road.[9]

---

[7] McAllister, *The Drunken Driving Crackdown: Is it Working?*, 74 A.B.A. J. 52, 54 (Sept. 1988).

[8] *See Final Report*, *supra* note 2, at 1; *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving*, *supra* note 1, at 9. *Jernigan & Mosher*, *supra* note 2, at 244.

[9] Most recently, the Department of Transportation has reviewed studies aimed at measuring the deterrent effect of sobriety checkpoints and has concluded that recent studies document "15-30 percent reductions in alcohol-related fatal crashes . . . ." Alcohol Abuse Prevention Program for the Transportation Industry, 54 Fed. Reg. 46,326, 46,335 (Nov. 2, 1989) (advance notice of proposed rulemaking). Critics of sobriety checkpoints, such as *Jacobs & Strossen*, *supra* note 5, at 640, who state that "it has not been convincingly demonstrated that drunk driving roadblocks have reduced drunk driving in any jurisdiction" are therefore plainly and simply wrong. Sobriety checkpoints have been a part of virtually every program that has made inroads against drunk driving. *See, e.g.*, Voas, Rhodenizer & Lynn, *Evaluation of Charlottesville Checkpoint Operations*, U.S. Dep't of Transp. Final Report, DOT HS 806 989, at 48 (May 1985) ("The number of alcohol-related accidents in Charlottesville was 8 to 15% lower during the year of checkpoint operations than in the previous three years"); *id.* at i ("A 13% reduction in alcohol-related accidents provided evidence that the checkpoint program was effective in reducing accidents due to impaired driving"); Levy, *Methodologies for the Evaluation of Local Traffic Safety Programs With an Application to New Jersey DWI Programs*, 11 Evaluation & Program Plan. 255, 264 (1988) (noting that the success of the "strike force" aspect of the New Jersey program, including predominantly sobriety checkpoints, has been significant and long lasting). *See also* Homel, Carseldine & Kearns, *Drink-Driving Countermeasures in Australia*, 4 Alcohol, Drugs & Driving 113 (1988) (noting that following the implementation of sobriety checkpoints in New South Wales, Australia, alcohol-related fatal crashes fell by approximately 36% and have remained at that level for over four years); Ross, *Britain's Christmas Crusade Against Drinking and Driving*, 48 J. Studies On Alcohol 476 (1987) (sobriety checkpoints used successfully to curb drunk driving during the Christmas season in the United Kingdom).

The particular value of sobriety checkpoints is their ability to help bring about general deterrence. In its latest progress report the Presidential Commission on Drunk Driving described this general deterrence goal as follows:

> [T]he object [of employing checkpoints] has not been to stop and arrest great numbers of possible offenders, rather, it has been to preclude drunk and impaired drivers from getting on the road, realizing they might not avoid detection at established checkpoints.[10]

This preeminent goal of sobriety checkpoints was inexplicably downplayed by both the trial court and the Mich-

---

[10] *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving*, *supra* note 1, at 10.

igan Court of Appeals, each of which purported to judge the effectiveness of Michigan's sobriety checkpoint program by looking to the number of drunk drivers apprehended at checkpoints. The fallacy of such an approach is succinctly put in H. Laurence Ross' study of the United Kingdom's "Christmas Crusade" against drunk driving, quoting the assistant chief constable for Derbyshire: "In traffic statistics, the more you catch, the more you have failed. The success rate is how many fewer we catch among the drivers tested. . . . We try to test as many people as possible, knowing they will be negative." [11]

The goal of sobriety checkpoints, then, is to raise the driving public's perception of the possibility of arrest when one drives under the influence of alcohol.[12] Sobriety checkpoints reinforce the message that our government takes drunk driving seriously by serving as a visible warning to both drunk drivers and sober drivers who might contemplate driving in an impaired state on some other occasion. Accomplishing this goal of heightened perception may have little or nothing to do with the actual

---

[11] *Ross, supra* note 9, at 478. The fallacious approach of attempting to equate arrests with effectiveness is also common among those commentators opposing continued use of sobriety checkpoints. *See, e.g., Jacobs & Strossen, supra* note 5, at 638 (contending that sobriety checkpoints lack efficacy because they tend to "produce very few drunk driving arrests").

[12] The critical role of raised public perception in any program seeking to achieve general deterrence of alcohol-related traffic injuries has recently been described by the Department of Transportation as follows:

> [I]f motor vehicle DWI offenders are not arrested, no sanctions can be imposed and no deterrence can occur. However, even if there is an increase in enforcement, this does not ensure that deterrence will result, since the public may not be sufficiently aware of such efforts.

Alcohol Abuse Prevention Program for the Transportation Industry, *supra* note 9, at 46,335.

number of drunk drivers apprehended at a particular checkpoint.[13] Thus, it has been noted that:

> The efficacy of measures such as DWI roadblocks, . . . is less dependent upon increasing the *actual* likelihood that a drinking driver will be apprehended and punished than upon affecting the public *perception* of such risks. If people are discouraged from drinking and driving because of the perceived threat of being ensnared in a sobriety checkpoint, it matters little that DWI arrests are not appreciably affected.[14]

Moreover, heightened public perception cannot (as the Michigan trial court and some commentators have suggested) be as effectively achieved through the use of more

---

[13] While general deterrence can be achieved even where significant numbers of drunk drivers are not arrested at sobriety checkpoints, it still should be borne in mind that drivers who *are* apprehended at checkpoints are dangerous and may have eluded detection if conventional detection methods were utilized. As noted in 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 10.8(d), at 72-73 (2d ed. 1987) (footnotes omitted):

> [E]ven if a patrolling officer is fortunate enough to be in the vicinity where a drunk driver is operating his vehicle, it does not necessarily follow that the driver will at that particular time drive his car in such a fashion as to create a reasonable suspicion justifying a stop. And the chances of such observation in the first place are rather slight, given the substantial number of intoxicated drivers on the roads.

See also People v. Bartley, 109 Ill. 2d 273, 287, 486 N.E.2d 880, 886 (1985), *cert. denied*, 475 U.S. 1068 (1986).

> [T]he ability of a drunk driver to avoid erratic movements along a roadway does not mean he will be able to respond to an emergency where prompt reflexes may be of great importance. . . . [T]he carnage caused by drinking and then driving is so serious it warrants resort to both types of apprehension—stopping automobiles which are being driven erratically and roadblocks to detect drunken drivers before they drive in an erratic manner.

[14] Acker, *Social Sciences and the Criminal Law: A Report on America's War Against Drunk Driving*, 25 Crim. L. Bull. 376, 385 (1989).

conventional law enforcement devices such as roving patrols on the lookout for erratic driving behavior.[15] This fact is strikingly shown in a study by Drs. Williams and Lund comparing public perception of enforcement of drunk driving laws in Fairfax, Virginia, and Montgomery County, Maryland.[16] The study demonstrated that while Fairfax, which did not use sobriety checkpoints, historically expended significant resources to enforce laws against driving while intoxicated, the perception of the public *in both jurisdictions* was that a drunken driver was more likely to be apprehended in Montgomery County, which historically spent less on enforcement of drunk driving laws but which did use the highly visible countermeasure of sobriety checkpoints.[17]

---

[15] *See, e.g., Jacobs & Strossen, supra* note 5, at 645 (contending that drunk driving can be policed more effectively by "roving patrols" watching for "erratic driving behavior."). As previously noted, *supra* note 13, such is not always the case.

[16] Williams & Lund, *Deterrent Effects of Checkpoints on Drinking and Driving*, 3 Traffic Safety Evaluation Research Rev. 7 (1984). *See also* the discussion of the Williams & Lund study set forth in Alcohol Abuse Prevention Program for the Transportation Industry, *supra* note 9, at 46,335.

[17] *Williams & Lund, supra* note 16, at 17. Similar results were reported by Drs. Williams and Lund in a comparison of Kent and Sussex Counties in Delaware (where sobriety checkpoints were used) and several Maryland Eastern Shore counties where checkpoints were not used. *Id.* at 14-15. *See also Acker*, supra note 14, at 384 (emphasis in original):

> For obvious reasons, it is preferable to pursue strategies designed to *prevent* drinking and driving instead of those simply aimed at apprehending drunk drivers. Under classical deterrence theory, preventive measures are most likely to succeed when potential offenders believe that the costs of engaging in illegal conduct outweigh the benefits of doing so. Such costs become increasingly significant as the perceived *certainty* of apprehension and punishment is enhanced and as the perceived *severity* and *celerity* of punishment are increased.

Clearly sobriety checkpoints have proven their value in the war against drunk driving. The National Commission on Drunk Driving reported in 1986 that sobriety checkpoints were being utilized against drunk driving in all but two states.[18] Of the 19 countermeasures monitored by the Commission in that year only one measured greater acceptance across the nation.[19] At the federal level, the use of sobriety checkpoints is one of the prerequisites for obtaining Alcohol Traffic Safety Incentive Grant Funds.[20] And most importantly, it is now becoming evident that programs incorporating sobriety checkpoints are having significant effect in terms of reducing the menace of drunken drivers on our nation's highways. Sobriety checkpoints are highly useful to target particular times of the day when drunk drivers are more likely to be on the road[21] or in targeting times of the year when drunken

---

[18] Those states were Pennsylvania and Utah. National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving*, at 2-3 (Dec. 1986).

[19] The Commission reported that ongoing "driving under the influence" training for police had been instituted in all but one state—Utah. *Id.*

[20] *See* 23 U.S.C. §§ 402, 408 (1982). Under regulations promulgated at 23 C.F.R. § 1309.6(b) (1989), in order to qualify for supplemental grants pursuant to § 402 a state must "[h]ave in place and implement or adopt . . . eight of the following twenty-two requirements" including:

> (11) Use of roadside sobriety checks as part of a comprehensive alcohol safety enforcement program. To demonstrate compliance, a State shall submit information showing that it is systematically using roadside sobriety checks. In addition, a State shall provide a copy of its regulation or policy authorizing the use of roadside checks.

Id. at § 1309.6(b)(11).

[21] As an example, the sobriety checkpoint operations in Charlottesville, Virginia generally took place at night on Friday and Saturday. *See Voas, Rhodenizer & Lynn, supra* note 9, at 4. It

driving is more likely to occur.[22] Moreover, and contrary to the holding of the trial court, the deterrent effect of sobriety checkpoints is not necessarily temporary.[23] Recent studies indicate that the beneficial results deriving from programs utilizing sobriety checkpoints can in fact be very long lasting.[24]

---

has been reported in a nationwide study conducted by the University of Michigan's Highway Research Institute that 3.2% of the drivers tested between 10:00 p.m. and midnight had blood alcohol contents at or above .10%, and 6.3% had levels between .05% and .09%. In the period between 2:00 and 3:00 a.m. 11.1% of the drivers tested at over .10% and 13.5% tested between .05% and .09%. *Jacobs & Strossen, supra* note 5, at 685 n.181.

[22] *See Ross, supra* note 9, reporting on the results of the United Kingdom's "Christmas Crusade".

[23] The trial court's discussion concerning the duration of any deterrent effect arising from the use of sobriety checkpoints is set forth in Pet. App. 92a-96a. Even where the results of sobriety checkpoints have been temporary, the Department of Transportation has recently noted as follows:

> Most of the observed reductions were temporary in nature, primarily because the enforcement efforts themselves were short-term. However, it would be improper to criticize enforcement programs for providing only temporary reductions when these programs have more frequently resulted in "bottomline" reductions in crashes than any other approach.

Alcohol Abuse Prevention Program for the Transportation Industry, *supra* note 9, at 46,335.

[24] *See, e.g., Levy, supra* note 9, at 255 (noting decreased traffic accidents involving drunk drivers in New Jersey dating from the institution of sobriety checkpoints in the early 1980s); *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving, supra* note 1, at 9 (noting that "New Jersey has reduced drunk driving deaths by 50% since 1981"); *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving, supra* note 18, at 8 (noting that in using an approach involving sobriety checkpoints and license suspension "[a]fter 10 years Minnesota has a fatality rate that is nearly 50% less than it was in 1976"); Shore & Maguin, *De-*

Finally, it must be emphasized that the benefits derived from the use of sobriety checkpoints far outweigh any inconveniences they cause the driving public. As noted by the Michigan trial court, "the average length of a stop when a person was confronted by a police officer at a checkpoint was approximately 30 seconds."[25] This minimal delay to motorists is consistent with delays experienced in other jurisdictions employing sobriety checkpoints.[26] While the Michigan courts and some commentators[27] have urged that such short delays are overly intrusive, motorists who have been subjected to sobriety checkpoints in fact consistently indicate that this is not the case and strongly support checkpoint programs.[28]

---

terrence of Drinking-Driving: The Effect of Changes in the Kansas Driving Under the Influence Law, 11 Evaluation & Program Plan. 245, 245 (1988) (noting that in Kansas "[t]he longevity of the [deterrent] effect differs from prior experiences, in which initial declines were followed by relatively rapid returns to pre-intervention rates"); *cf. Homel, Carseldine & Kearns, supra* note 9, at 113 (noting that the 36% drop in alcohol-related fatalities following the institution of sobriety checkpoints in New South Wales, Australia, "has been sustained for more than four years.").

[25] Pet. App. 103a.

[26] *See, e.g., Voas, Rhodenizer & Lynn, supra* note 9, at 4 (indicating an average delay of significantly less than one minute at sobriety checkpoints in Charlottesville, Virginia).

[27] *See, e.g., Jacobs & Strossen, supra* note 5, at 650-54.

[28] *See* Note, *Clearing the Roadblocks to Sobriety Checkpoints*, 21 U. Mich. J.L. Ref. 489, 489 n.6 (1988), summarizing a study of 2,473 California drivers who had been subjected to sobriety checkpoints. 90.7% reported that the checkpoint did not significantly delay their journey and 87.1% indicated they approved of the use of sobriety checkpoints to detect and remove drunk drivers from the highway. *See also Voas, Rhodenizer & Lynn, supra* note 9; Lacey, *Enforcement and Public Information Strategies for DWI General Deterrence: ARREST DRUNK DRIVING—The Clearwater and Largo, Florida Experience*, U.S. Dep't of Transp. Final Report, DOT HS 807 066 (Dec. 1986).

Having said this, it can of course be conceded that a sobriety checkpoint causes a certain amount of anxiety in drivers. But a little bit of anxiety is not necessarily a bad thing. As the President's Commission has pointed out, one of the major tasks that must be accomplished if drunken drivers are to be removed from the highways is to change the public's perception of the "funny drunk."[29] Sobriety checkpoints send the clear message that drunken driving is no longer to be tolerated in this country. There is nothing "funny" about it. The process of reeducating the driving public to the fact that we will no longer countenance drunk drivers has been described as follows:

> Initially, compliance may be motivated by the *fear component* of the law. But if the inculcation process is effective, the *moral component* may supplant the fear component and, thereby, inhibit violations even when there is no chance of being caught. Still a further possibility is that the *habit component* may supercede [sic] so that the driver no longer considers the legal or moral issues, but complies more or less automatically.[30]

The *amici* urge that the value of sobriety checkpoints in fighting the war against drunk driving is clear. While strides are being made, the war is far from over. It would therefore be a sad mistake were the Court to agree with the Michigan courts and take away the sword just when the battle is joined. Sometimes individual victories in the war against drunken driving may seem hard to identify. But this should not be the case. They occur each and every time a child alights safely from a school bus.

---

[29] *Final Report*, *supra* note 2, at 1.

[30] Snortum, *On Seeing the Forest and the Trees: The Need for Contextual Analysis in Evaluating Drunk Driving Policies*, 11 Evaluation & Program Plan. 279, 290 (1988) (emphasis in original).

II. SOBRIETY CHECKPOINTS ARE CONSTITUTIONAL

A. Sobriety Checkpoints Are Valid As Reasonable Conditions of Access to Public Highways

1. *Sobriety Checkpoints Are Closely Related to Highway Safety And Thus Should Be Evaluated Differently From General Law Enforcement Searches and Seizures*

Michigan's sobriety checkpoint program imposes certain requirements upon motorists for the protection of their own safety and the safety of other motorists and pedestrians. It requires motorists who enter a checkpoint to submit to a brief examination to determine whether they are in compliance with state law standards regarding drunk driving—standards established in recognition of the danger that drunk driving poses to highway users. The sobriety checkpoint program is, in short, a highway safety measure; it is imposed upon highway users to advance a permissible, and indeed essential, objective of the public highway program itself.

Despite the clear nexus between sobriety checkpoints and the use of publicly-owned highways, the court below evaluated the constitutionality of Michigan's sobriety checkpoint program under the standards that this Court has developed with respect to law enforcement searches and seizures in general, such as those undertaken to obtain evidence of violent crimes, thefts, or drug possession. The court below stated that the relevant standards were those set forth in this Court's cases involving enforcement of immigration laws, *see United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), or involving a suspicion of unspecified criminal activity by the defendant, *see Brown v. Texas*, 443 U.S. 47 (1979). *See Sitz v. Department of State Police*, Pet. App. 7a-11a. In those cases, however, there was no nexus between the purpose of the search and seizure at issue and the use of public facilities. The un-

differentiated use of those cases by the court below should be rejected.

This Court has repeatedly distinguished searches or seizures of motorists imposed as a legitimate condition of the use of public highways from general law-enforcement searches or seizures. In *United States v. Ortiz*, 422 U.S. 891 (1975), the Court held that searches of automobiles for illegal aliens, if performed at checkpoints removed from the border and its functional equivalents, were invalid under the Fourth Amendment unless supported by probable cause. The Court disclaimed any intention to require probable cause for all automobile searches, however. The Court noted, "It is quite possible, for example, that different considerations would apply to routine safety inspections *required as a condition of road use*." *Id.* at 897 n.3 (emphasis added). In *Brignoni-Ponce*, the Court again noted the potential significance of the connection between certain highway searches and seizures and the safety objectives of the highway program:

> Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local law enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters.

422 U.S. at 883 n.8.

The Court in *Martinez-Fuerte*, as in *Ortiz* and *Brignoni-Ponce*, took pains to distinguish the validity of brief stops for questioning "to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters." 428 U.S. at 560 n.14. While noting that the validity of such stops was not before it, the

Court pointed out that the practice "has a long history evidencing its utility and is accepted by motorists as incident to highway use." *Id.*

In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court held invalid a highway stop undertaken by a patrolling police officer to check the defendant's license and auto registration. The Court made clear, however, that its holding did not reach "spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Id.* at 663. In a footnote, the Court added, "Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others." *Id.* at 663 n.26.

The Court's repeated suggestions as to the distinct status of automobile stops for enforcement of motor vehicle laws do not, of course, entail granting the states an open-ended power to place unrelated conditions on the use of highways. A motorist must be deemed to accept certain law enforcement measures that effectuate the purposes of the public highway program, but it does not follow that a motorist can be deemed to have granted the state, as a condition of using the highways, an unlimited power to stop his or her automobile at any time without suspicion and conduct a search for contraband.[21] Rather, the Court's statements as to automobile stops in *Ortiz*, *Brignoni-Ponce*, *Martinez-Fuerte*, and *Prouse* simply recognize that the reasonableness of automobile searches or seizures undertaken to further the objectives of the pub-

---

[21] If, however, evidence of other criminal activity is in plain view at a checkpoint established for enforcement of laws regarding driver's licenses, sobriety, or other motor vehicle matters, then that evidence may be seized there, just as evidence in plain view may be seized in other situations. *See Arizona v. Hicks*, 480 U.S. 321 (1987); *Texas v. Brown*, 460 U.S. 730 (1983); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

lic highway program must be evaluated on a different basis from those undertaken for other law enforcement purposes. Certain law enforcement measures are part of the general system of highway safety enforcement that a state can legitimately impose upon motorists on the basis of implied consent.[32] In contrast, the immigration laws that the Border Patrol sought to enforce with automobile stops in *Ortiz*, *Brignoni-Ponce*, and *Martinez-Fuerte* did not bear any such relation to the highway program.

2. *Sobriety Checkpoints Are Analogous to Administrative Searches That Have Been Held to Comply With The Fourth Amendment*

The distinctive relationship of sobriety checkpoints to safety supports their validity under the Fourth Amendment as reasonable conditions of access to the publicly-owned highway system. Because they are not undertaken for general law enforcement purposes unrelated to highway safety, it is unnecessary to characterize such searches as "administrative" rather than "criminal" in order to sustain them. However, the administrative search doc-

---

[32] The same rationale holds in the context of airline travel, where passengers are screened for weapons prior to flight, whether a reasonable suspicion exists or not. *See National Treasury Employees Union v. Von Raab*, —— U.S. ——, —— n.3, 109 S. Ct. 1384, 1395 n.3 (1989). The validity of the screening procedure seems clear not only when considered under the balancing test applied to general law enforcement searches, but also when considered as a safety-related condition upon the use of airports. A number of federal and state appellate decisions have upheld such searches on the basis of implied consent. *See, e.g., United States v. Haynie*, 637 F.2d 227, 230 (4th Cir. 1980), *cert. denied sub nom. Fletcher v. United States*, 451 U.S. 972 (1981); *United States v. Pulido-Baquerizo*, 800 F.2d 899 (9th Cir. 1986); *United States v. Henry*, 615 F.2d 1223, 1228 (9th Cir. 1980); *United States v. Herzbrun*, 723 F.2d 773, 776 (11th Cir. 1984); *Shapiro v. State*, 390 So.2d 344, 347 (Fla. 1980), *cert. denied*, 450 U.S. 982 (1981). *Cf. McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978) (implied consent to search prior to entering courthouse).

trine provides an additional rationale for the validity of sobriety checkpoints.

The Court in *Delaware v. Prouse* drew a distinction between automobiles and certain highly-regulated industries for purposes of discretionary administrative searches, holding that automobile inspections unaccompanied by individualized suspicion "must be undertaken pursuant to previously specified 'neutral criteria.'" 440 U.S. at 662, citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 323 (1978).

Subsequently, the Court elaborated the administrative search doctrine in *New York v. Burger*, 428 U.S. 691 (1987), in terms fully applicable to the present situation. Use of the highways, of course, has for many years been highly regulated. *See id.* at 703-07. The Court has recognized the diminished expectations of privacy that attend the operation of automobiles on public highways.[33]

Roadside sobriety checkpoints satisfy the three criteria set forth in *Burger* for making warrantless regulatory inspections valid under the Fourth Amendment. 482 U.S. at 708-12. First, as noted above, the state has an interest in preventing the loss of life caused by drunk driving, which is certainly a weightier interest than the problem of automobile theft addressed by the regulatory scheme in *Burger*. Second, the requirement of a warrant or individualized suspicion would interfere with the deterrent impact that sobriety checkpoints are designed to achieve. Third, the characteristics of a sobriety checkpoint program provide a constitutionally adequate substitute for a warrant by placing appropriate constraints upon police discretion. *See also Donovan v. Dewey*, 452 U.S. 594, 603, 605 (1981).

Finally, as the Court pointed out in *Burger*, the facts that drunk driving is a criminal offense and that check-

---

[33] *See, e.g., Arkansas v. Sanders*, 442 U.S. 753, 761 (1979); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1978).

points are operated by police officers do not preclude applicability of the administrative search doctrine. 482 U.S. at 712-18.

The California Supreme Court, in *Ingersoll v. Palmer*, 241 Cal. Rptr. 42, 43 Cal. 3d 1321, 743 P.2d 1299 (1987), relied upon the administrative search doctrine in upholding a sobriety checkpoint on the basis that it "was operated not for the primary purpose of discovering or preserving evidence of crime or arresting lawbreakers, but primarily for the regulatory purpose of keeping intoxicated drivers off the highways to the end of enhancing public safety." 743 P.2d at 1309. As indicated above, we do not believe this characterization is essential for upholding the validity of sobriety checkpoints under the Fourth Amendment, but it provides an additional rationale that is fully consistent with this Court's decisions.

3. *Sobriety Checkpoints Are Reasonable Because They Do Not Involve The Unconstrained Exercise of Discretion*

Whatever the additional limitations that may govern automobile stops for general law enforcement purposes, sobriety checkpoints should be judged under the standard suggested by the opinion of the Court and the concurrence in *Prouse* regarding license checkpoints. *See Prouse*, 440 U.S. at 663; *id.* at 664 (Blackmun, J., concurring).[34] Although the Court in *Prouse* suppressed evidence from a license check done by a patrolling police officer without reasonable suspicion, the Court stated that it was allowable to perform "spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Id.* at 663. The Court noted, "Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* Justice Blackmun observed that the Court's objective of controlling police intrusion and discretion would also be satisfied by "other not purely random stops (such as every tenth car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop." *Id.* at 664.

[34] In *Texas v. Brown*, *supra*, four members of the Court stated that a stop at a license checkpoint was valid, citing *Prouse*. *See Texas v. Brown*, 460 U.S. at 739 (Rehnquist, J.) (plurality opinion). The concurring Justices did not indicate whether the initial stop at the license checkpoint in that case was valid. *See id.* at 746 (Powell, J., concurring); *id.* at 747 (Stevens, J., concurring).

The checkpoint standard suggested in *Prouse*, by limiting or eliminating the subjective discretion of the police as to which vehicles will be stopped, amply protects motorists from pretextual stops made for arbitrary or invidious reasons. The Michigan checkpoint program meets this standard. Under the procedures established for the program, all motorists were to be stopped upon reaching a checkpoint. *Sitz*, Pet. App. 5a; *Michigan State Police Sobriety Checkpoint Guidelines* § VII(E) (1986), Pet. App. 154a.

Following a brief initial contact with the motorist, the officers at the checkpoint were to send the motorist on his or her way or to detain the motorist for testing. *Id.* The decision to detain a motorist, although dependent on the officers' professional judgment, was to be made in accordance with standards that would satisfy the reasonable suspicion requirement for an investigative detention, *see Terry v. Ohio*, 392 U.S. 1 (1968), or the probable cause requirement for an arrest. The trial court found that the decision to detain a motorist further, after a brief initial contact, was made in accordance with "those standards commonly used by police to stop vehicles in order to investigate for possible drunk driving." Wayne County Circuit Court Opinion in *Sitz v. Michigan Dep't of State Police*, No. 86-613-063-C2 (Wayne County 3d Jud. Cir. July 26, 1986), Pet. App. 111a-112a. In particular, the procedures directed that the officers were to "be alert for articulable indications of intoxication," such as "an odor of intoxicants about the driver, slurred speech, lack of

physical coordination, unusual eye movements, disorientation, or other behavior commonly associated with OUIL or OUID." *Michigan State Police Sobriety Checkpoint Guidelines, supra*, § VII(E), Pet. App. 155a. Only those drivers exhibiting signs of intoxication were to be detained beyond the initial contact.

In summary, a checkpoint program such as Michigan's sobriety checkpoint program, operated to enforce highway safety standards or other motor vehicle laws, should be upheld as a reasonable search and seizure where the decision to stop a vehicle is determined by nondiscretionary criteria, as suggested in *Prouse*, and where any further detention is made in accordance with the applicable requirements for investigatory detentions or arrests.

B. Sobriety Checkpoints Are Also Valid Under This Court's Fourth Amendment Balancing Test As Applied To Checkpoints For General Law Enforcement

1. *Sobriety Checkpoints Are Minimally Intrusive And Are Supported By A Weighty Public Interest*

As set forth in Part II-A, the court below erred in reviewing the sobriety checkpoint program on the same basis as searches and seizures for general law enforcement purposes unrelated to highway laws. Even under the balancing test that the court applied, however, Michigan's program should be upheld. In the view of the court below, the controlling standard was that described in *Brown v. Texas, supra*, concerning seizures that are less intrusive than a traditional arrest: "'Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure serves the public interest, and the severity of the interference with individual liberty.'" *Sitz*, Pet. App. 11a (quoting *Brown v. Texas*, 443 U.S. at 50-51).

The public concerns served by sobriety checkpoints are of the highest importance. The court below noted that the evidence in the trial record indicated that alcohol use contributed to between twenty-five and fifty percent of motor vehicle fatalities. *Sitz*, Pet. App. 13a. In fact, the President's Commission on Drunk Driving concluded that alcohol use contributed to *at least* fifty percent of motor vehicle fatalities.[35] As discussed in Part I of this submission, few public concerns are weightier than preventing the loss of thousands of lives each year from drunk driving.

It is equally clear that sobriety checkpoints pose only the most minimal interference with the liberty of the motorist. The vast majority of motorists will pass through the checkpoint without having to leave their cars and without any appreciable delay. The court below noted that at the first operation of a checkpoint under Michigan's program, the average delay to motorists was twenty-five seconds or less. Of the 126 vehicles that passed through the checkpoint, only two drivers were detained for further sobriety testing, of whom one was arrested.[36] *Sitz*, Pet. App. 6a.

Despite the seemingly lopsided balance between the significant public interest in prevention of drunk driving and the negligible burden of passing through the checkpoint, the court below managed to find the checkpoint program invalid. It did so on two grounds: first, that sobriety checkpoints were either not an effective means of controlling drunk driving or not the most effective means, *id.* at 14a-20a, and second, that sobriety checkpoints had the potential "to generate fear and surprise to motorists," *id.* at 20a-22a. As the following sections will discuss, both of these holdings were erroneous.

---

[35] *See* page 3 *supra*.

[36] A third driver went through the checkpoint without stopping and was arrested for drunk driving.

2. *The Validity Of Sobriety Checkpoints Does Not Hinge Upon Whether They Can Be Shown To Be The Least Intrusive Or Most Effective Means Of Drunk Driving Control*

The court below held that sobriety checkpoints were ineffective in that they produced a low number of arrests; it noted expert testimony that "one percent or fewer of the drivers passing through sobriety checkpoints are arrested for drunk driving" and that any deterrent effect would continue only temporarily. *Id.* at 15a. (The court gave no reason for regarding one percent as an insufficient proportion of arrestees or for regarding a short-term deterrent effect as inadequate to justify the program.) The court also found that other, more effective means of combatting drunk driving were available.

The court's views were erroneous as a matter of fact and irrelevant as a matter of Fourth Amendment law.[37] As a factual matter, sobriety checkpoints serve to deter potential drunk drivers who would not be deterred by other, less visible, means of enforcement.[38] They also enable the police to detect drunk drivers who have enough control to avoid obviously erratic movements but who may

[37] Some other state courts have looked to the existence of less intrusive or more efficient means in striking down a sobriety checkpoint. *See, e.g., State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (Idaho 1988); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983); *State v. Leighton*, 551 A.2d 116 (Me. 1988); *State v. Muzik*, 379 N.W.2d 599 (Minn. Ct. App. 1985); *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985); *Seattle v. Mesiani*, 110 Wash. 2d 454, 755 P.2d 775 (1988). A number of state courts, however, have expressly rejected the argument that a sobriety checkpoint must be supported by a showing as to the absence of less intrusive or more efficient means. *See, e.g., People v. Bartley*, 93 Ill. Dec. 347, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 476 U.S. 1068 (1986); *State v. Garcia*, 500 N.E.2d 158 (Ind. 1986), *cert. denied*, 481 U.S. 1014 (1987); *Commonwealth v. Shields*, 402 Mass. 162, 521 N.E.2d 987 (1988); *State v. Welch*, 755 S.W.2d 624 (Mo. Ct. App. 1988).

[38] *See* page 10 *supra*.

not be able to respond adequately in a sudden emergency.[39] As a matter of law, the court erred in assuming that sobriety checkpoints must satisfy some threshold level of effectiveness or that they must be the least intrusive or most effective means available. This Court has rejected the view that the Fourth Amendment imposes such requirements. "'[T]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.'" *Skinner v. Railway Labor Executives' Ass'n*, —— U.S. ——, —— n.9, 109 S. Ct. 1402, 1419 n.9 (1989) (quoting *Martinez-Fuerte*, 428 U.S. at 556-57 n.12). *See also National Treasury Employees Union*, —— U.S. at —— & n.3, 109 S. Ct. at 1395 & n.3; *United States v. Villamonte-Marquez*, 462 U.S. 579, 591 n.5 (1983); *Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973). *But see Prouse*, 440 U.S. at 659.

3. *The "Fear And Surprise" Standard Applied By The Court Below Is Without A Factual Basis*

The Court below affirmed the trial court's finding that although the "objective intrusion" by the checkpoints was "minimal," the checkpoints nonetheless infringed the Fourth Amendment because they could produce "subjective intrusion" in the form of "fear or surprise" to motorists. *Sitz*, Pet. App. 21a. Among the features of the checkpoints that the trial court found to contribute to fear and surprise was that the public would not necessarily receive advance notice of the existence of a checkpoint, because although the police planned to inform the news media as to the county in which a checkpoint would be located, "the defendants have not indicated that the news media are required to publish this information or to give the checkpoint any special attention." Wayne County Circuit Court Opinion, Pet. App. 108a. Also, the

[39] *See* page 9 n.13 *supra*.

trial court noted, "there is no dispute that at least the publicly stated purpose of checkpoints . . . is to search for violators of criminal law. Thus, the potential for checkpoints in generating fear in motorists as they pass through is heightened." *Id.* at 110a.

The "finding" of the trial court regarding fear and surprise was entirely speculative. The reliance of the court below and some other state courts[40] upon fear and surprise as a basis for invalidating sobriety checkpoints stems from statements of this court in *Martinez-Fuerte*, 428 U.S. at 558, and *Ortiz*, 422 U.S. at 894-95. In those cases, the Court distinguished checkpoint stops and stops by roving patrol cars partly on the ground that being stopped at a fixed checkpoint rather than by a roving patrol car would inspire less concern on the part of the motorist. This Court should now make clear that checkpoint stops differ constitutionally from random stops by patrol cars because checkpoint stops involve less police discretion, not because they putatively inspire less fear or surprise.

In deciding the validity of a search or seizure, consideration of subjective factors may sometimes be appropriate, but courts should not make speculative forays into armchair psychology in doing so. Absent any firm basis for determining that a search or seizure will generate undue "fear or surprise," invalidating a search or seizure on that ground is undesirable for two reasons. First, such a conclusion is essentially arbitrary. For example, although this Court found in *Martinez-Fuerte* and *Ortiz* that a sizable police presence, with highly visible indicia of official authority, serves to reduce fear and surprise, respondents in this case argue that a sizable police presence serves to *stimulate* fear and surprise. *See* Brief In

[40] Other state court decisions that have looked to "fear and surprise" in striking down sobriety checkpoints include *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984); *Webb v. State*, 739 S.W.2d 802 (Tex. Crim. App. 1987).

Opposition To Petition For Writ Of Certiorari, at 29. The point is not that respondents are incorrect in this assertion, but rather that there is no basis in the record to support *either* position. Second, reliance on certain aspects of a search and seizure as engendering fear or surprise will leave courts in the future with virtually unconstrained discretion to uphold or invalidate a police activity under slightly different facts and, correspondingly, will provide localities with little guidance as to what police activities are permissible or impermissible. Searches or seizures that are as fleeting and limited as the checkpoint at issue here clearly do not justify the lower court's reliance on "fear or surprise" as a ground for invalidation.

C. The Fourth Amendment Does Not Authorize The Judiciary to Engage in Detailed Oversight of Public Policymaking As To Sobriety Checkpoints

Many state courts reviewing sobriety checkpoints have looked to factors bearing no relation to the intrusiveness of the checkpoint, such as the rationality of a checkpoint location,[41] the level of the police command structure at which the location was chosen,[42] or the provision of advance publicity as to the existence of the checkpoint on a particular date.[43] The Supreme Court of Kansas, in *Deskins*, listed these and other factors as part of a balancing inquiry:

> Numerous conditions and factors must be considered in determining whether a DUI roadblock meets the

[41] *See, e.g., State v. Muzik*, 379 N.W.2d 599, 603 (Minn. Ct. App. 1985); *State v. Egan*, 213 N.J. Super. 133, 516 A.2d 1115 (N.J. Super. Ct. App. Div. 1986) (state constitution).

[42] *See, e.g., State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693 (Ga. Ct. App. 1984); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976).

[43] *See, e.g., State v. Deskins*, 234 Kan. 329, 673 P.2d 1174, 1185 (1983).

balancing test in favor of the state. Among the factors which should be considered are: (1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.[44]

Some of these factors may be worthwhile measures for a police department to consider as a matter of policy. They are not properly matters for judicial oversight, however. Open-ended, highly fact-specific decisions such as the one quoted above must lead to perpetual relitigation of the issue. No thirteen-factor balancing test can possibly provide a stable or predictable jurisprudence. *Cf. Solorio v. United States*, —— U.S. ——, ——, 107 S. Ct. 2924, 2931-32 (1987). As with reliance on the subjective factors of "fear or surprise," utilization of these essentially policy-based factors will leave reviewing courts with unconstrained discretion in distinguishing future checkpoints and will leave localities without guidance.

More important, the Fourth Amendment simply does not charge the judiciary with reviewing the location of a checkpoint, the time and duration of a checkpoint, or other matters ordinarily within the province of local authorities. For example, absent an independent basis for reviewing a choice of checkpoint location—*e.g.*, that it was chosen for racially discriminatory purposes—that

[44] *Id.*

choice is within the plenary discretion of the police. The Fourth Amendment provides no basis for courts to engage in close management of police operations except to the extent that police conduct violates "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

CONCLUSION

For the foregoing reasons, the judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

RICHARD K. WILLARD *
DALE C. ANDREWS
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

Attorneys for Amici Curiae

Date: November 16, 1989

* Counsel of Record

APPENDIX

APPENDIX

State Appellate Decisions
Regarding Constitutionality of
Sobriety Checkpoints

A. *Decisions Upholding Sobriety Checkpoints*

Arizona: *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984).

Arkansas: *Coffman v. State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988).

California: *Ingersoll v. Palmer*, 241 Cal. Rptr. 42, 43 Cal. 3d 1321, 743 P.2d 1299 (1987).

Georgia: *State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693 (1984).

Illinois: *People v. Bartley*, 93 Ill. Dec. 347, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 467 U.S. 108 (1986).

Indiana: *State v. Garcia*, 500 N.E.2d 158 (Ind. 1986), *cert. denied*, 481 U.S. 1014 (1987).

Iowa: *State v. Riley*, 377 N.W.2d 242 (Iowa Ct. App. 1985).

Kansas: *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983).

Kentucky: *Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. Ct. App. 1983), *cert. denied*, 465 U.S. 1105 (1984).

Maine: *State v. Leighton*, 551 A.2d 116 (Me. 1988).

Maryland: *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984).

Massachusetts: *Commonwealth v. Shields*, 402 Mass. 162, 521 N.E.2d 987 (Mass. 1988); *Commonwealth v. Trumble*, 396 Mass. 81, 483 N.E.2d 1102 (1985).

Missouri: *State v. Welch*, 755 S.W.2d 624 (Mo. Ct. App. 1988).

New Hampshire: *Opinion of the Justices*, 128 N.H. 14, 509 A.2d 744 (1986).

New Mexico: *City of Las Cruces v. Betancourt*, 105 N.M. 655, 735 P.2d 1161 (N.M. Ct. App. 1987).

New York: *People v. Scott*, 63 N.Y.2d 518, 483 N.Y.S.2d 649, 473 N.E.2d 1 (1984).

Oregon: *Nelson v. Lane County*, 304 Or. 97, 743 P.2d 692 (1987).

Pennsylvania: *Commonwealth v. Tarbert*, 535 A.2d 1035 (Pa. 1985).

Vermont: *State v. Record*, 548 A.2d 422 (Vt. 1988); *State v. Martin*, 496 A.2d 442 (Vt. 1985).

Virginia: *Lowe v. Commonwealth*, 337 S.E.2d 273 (Va. 1985), *cert. denied*, 475 U.S. 1084 (1986).

B. *Decisions Invalidating Sobriety Checkpoints*

Florida: *State v. Jones*, 483 So. 2d 433 (Fla. 1986).

Idaho: *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (Idaho 1988).

Louisiana: *State v. Church*, 538 So. 2d 993 (La. 1989).

Michigan: *Sitz v. State Police*, 170 Mich. App. 433, 429 N.W.2d 180 (1988), *application for leave to appeal denied*, 432 Mich. 872 (Mich. 1989).

Minnesota: *State v. Muzik*, 379 N.W.2d 599 (Minn. Ct. App. 1985).

Nebraska: *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986).

New Hampshire: *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985).

New Jersey: *State v. Egan*, 213 N.J. Super. 133, 516 A.2d 1115 (N.J. Super. Ct. App. Div. 1986).

Oklahoma: *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984).

Rhode Island: *Pimental v. Department of Transportation*, 561 A.2d 1348 (R.I. 1989).

South Dakota: *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976).

Texas: *Webb v. State*, 739 S.W.2d 802 (Tex. Crim. App. 1987).

Washington: *Seattle v. Mesiani*, 110 Wash. 2d 454, 755 P.2d 775 (1988).

Supreme Court, U.S.
FILED
NOV 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE, *et al.*,
Petitioners,

v.

RICK SITZ, *et al.*,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE SUPPORTING NEITHER PARTY

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street N.W.
Washington, D.C. 20006
(202) 637-5340

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. The Fourth Amendment Requires That Suspicionless Search or Seizure Programs Be No More Than Minimally Intrusive Into Privacy and Dignity Interests	6
II. The Role of the Minimal Intrusiveness Requirement In Evaluating Suspicionless—and Especially Random—Searches or Seizures	11
III. Reviewing Highway Sobriety Checkpoint Programs To Assure That They Impose No More Than Minimal Intrusions	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Almeida-Sanchez v. United States, 413 U.S. 266 (1973)	*passim*
Brinegar v. United States, 338 U.S. 160 (1949)	7
Brown v. Texas, 443 U.S. 47 (1979)	6, 9, 13
Carroll v. United States, 267 U.S. 132 (1925)	14, 18
Commonwealth v. Amaral, 495 N.E.2d 276 (Mass. 1986)	19
Commonwealth v. Trumble, 483 N.E.2d 1102 (Mass. 1985)	17
Delaware v. Prouse, 440 U.S. 648 (1979)	*passim*
Duniway v. New York, 442 U.S. 200 (1979)	8
Griffin v. Wisconsin, —— U.S. ——, 55 U.S.L.W. 5156 (June 23, 1987)	10
National Treasury Employees Union v. von Raab, —— U.S. ——, 57 U.S.L.W. 4338 (March 21, 1989)	*passim*
New Jersey v. T.L.O., 469 U.S. 325 (1985)	*passim*
O'Connor v. Ortega, 480 U.S. 709 (1987)	10, 16
Olmstead v. United States, 277 U.S. 438 (1928)	7
Patchogue-Medford Teachers Cong. v. Board of Education, 510 N.E.2d 325 (NY 1987)	17
People v. Scott, 473 N.E.2d 1 (NY 1984)	17
Schmerber v. California, 384 U.S. 757 (1966)	7
Skinner v. Railway Labor Executives' Association, —— U.S. ——, 57 U.S.L.W. 4324 (March 21, 1989)	*passim*
South Dakota v. Opperman, 428 U.S. 364 (1976)	16
Stark v. Perpich, 590 F. Supp. 1057 (D. Minn. 1984)	18
State v. Deskins, 673 P.2d 1174 (Kan. 1983)	19
State v. Hillesheim, 291 N.W.2d 314 (Iowa 1980)	19
State v. Superior Court, 691 P.2d 1073 (Ariz. 1984)	17
Terry v. Ohio, 392 U.S. 1 (1968)	12
United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973)	8
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	2

TABLE OF AUTHORITIES—Continued

	Page
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	*passim*
United States v. Maxwell, 565 F.2d 596 (9th Cir. 1977)	18
United States v. Ortiz, 422 U.S. 891 (1975)	*passim*
United States v. Place, 462 U.S. 696 (1983)	11
Webb v. State, 739 S.W.2d 802 (Tex. Cr. App. 1987)	19
Winston v. Lee, 470 U.S. 753 (1985)	7, 9
Wyman v. James, 400 U.S. 309 (1971)	12

MISCELLANEOUS:

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974)	9
Coast Guard, *Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel*, 53 Fed. Reg. 47064 (November 21, 1988)	3
Department of Defense, *Federal Acquisition Regulation Supplement; Drug-Free Work Force*, 53 Fed. Reg. 37763 (September 28, 1988), supplemented by *Questions and Answers Prepared by Defense Department on Drug Free Workplace Regulations for Federal Contractors*, BNA Daily Labor Report, April 10, 1989 at G-1	2
Federal Aviation Administration, *Anti-Drug Program for Personnel Engaged in Specified Aviation Activities*, 53 Fed. Reg. 47024 (November 21, 1988)	3
Federal Highway Administration, *Controlled Substance Testing*, 53 Fed. Reg. 47134 (November 21, 1988)	3
Federal Railroad Administration, *Random Drug Testing; Amendments to Alcohol/Drug Regulations*, 53 Fed. Reg. 47102 (November 21, 1988)	3
Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion*, 18 U.C. Davis L.R. 595, 672 (1985)	18

TABLE OF AUTHORITIES—Continued

	Page
Office of Workplace Initiatives, National Institute on Drug Abuse, *Report to Congress: Federal Agency Drug-Free Workplace Programs, Tier I Agencies* (March 29, 1988)	3
Research and Special Programs Administration, *Control of Drug Use in Natural Gas, Liquified Natural Gas and Hazardous Liquid Pipeline Operations*, 53 Fed. Reg. 47084 (November 21, 1988)	3
Urban Mass Transportation Administration, *Control of Drug Use in Mass Transportation Operations*, 53 Fed. Reg. 47156 (November 21, 1988)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1897

MICHIGAN DEPARTMENT OF STATE POLICE, *et al.*,
Petitioners,

v.

RICK SITZ, *et al.*,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE SUPPORTING NEITHER PARTY

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO")—a federation of 90 national and international labor organizations having a total membership of approximately 14 million working men and women—is filed with the consent of the parties, and in support of neither party, as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The highway sobriety checkpoint program in question in this case involves government seizures of individual motorists in the absence of any individualized suspicion that the individuals have committed any wrong or pose any threat to the safety of others and, indeed, in the absence of any discrete event that might serve as a basis for making them the target of special government inquiries. Put simply, the individuals to be seized in this program are to be randomly selected from among those who are pursuing their normal, lawful, seemingly uneventful, every-day activities: in the instant case, from among those who are simply driving their cars on a public highway. This case, in other words, continues the trend in which the Court has examined the constitutionality of random personal search or seizure programs in the automobile stop context. *See, e.g., Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

At the outset, we freely acknowledge that the AFL-CIO has no specific organizational interest, or expertise, in the constitutionality of the highway sobriety checkpoint practices at issue here. The AFL-CIO does, however, have a strong interest and concern in the more general issue of how random programs of personal searches and seizures should be evaluated under the Fourth Amendment. Increasingly large sectors of the American work force—including those organized by AFL-CIO unions—are being subjected to governmentally-established programs of mandatory, random, repetitive, and often unannounced, urine collection drug testing.[1] AFL-CIO unions have, accordingly, been extensively involved in litigation challenging many of those programs as impermissibly intrusive under the Fourth Amendment. To date, this Court has only had occasion to examine certain *non-random* drug testing programs. *See Skinner v. Railway Labor Executives' Ass'n*, —— U.S. ——, 57 U.S.L.W. 4324 (March 21, 1989) (testing triggered by individual's involvement in accident or safety rule violation); *National Treasury Employees Union v. von Raab*, —— U.S. ——, 57 U.S.L.W. 4338 (March 21, 1989) (testing triggered by individual's application and receipt of sensitive government job). The Court has not yet examined the issue of mandatory *random* drug testing in any context.

[1] *See, e.g.*, Department of Defense, *Federal Acquisition Regulation Supplement; Drug-Free Work Force*, 53 Fed. Reg. 37763 (September 28, 1988), supplemented by *Questions and Answers Prepared by Defense Department on Drug Free Workplace Regulations for Federal Contractors*, BNA Daily Labor Report, April 10, 1989, at G-1 (requiring random drug testing of employees of defense contractors); Coast Guard, *Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel*, 53 Fed. Reg. 47064 (November 21, 1988) (requiring random drug testing of employees in commercial maritime industry); Federal Aviation Administration, *Anti-Drug Program for Personnel Engaged in Specified Aviation Activities*, 53 Fed. Reg. 47024 (November 21, 1988) (requiring random drug testing of employees in commercial aviation industry); Federal Highway Administration, *Controlled Substance Testing*, 53 Fed. Reg. 47134 (November 21, 1988) (requiring random drug testing of employees in motor carriage industry); Federal Railroad Administration, *Random Drug Testings; Amendments to Alcohol/Drug Regulations*, 53 Fed. Reg. 47102 (November 21, 1988) (requiring random drug testing of employees in railroad industry); Research and Special Programs Administration, *Control of Drug Use in Natural Gas, Liquified Natural Gas and Hazardous Liquid Pipeline Operations*, 53 Fed. Reg. 47084 (November 21, 1988) (requiring random drug testing of employees in pipeline industry); Urban Mass Transportation Administration, *Control of Drug Use in Mass Transportation Operations*, 53 Fed. Reg. 47156 (November 21, 1988) (requiring random drug testing of employees in urban mass transit industry); *see also* Office of Workplace Initiatives, National Institute on Drug Abuse, *Report to Congress: Federal Agency Drug-Free Workplace Programs, Tier I Agencies* (March 29, 1988) (describing extensive random drug testing programs governing over 300,000 federal employees).

Automobile sobriety checkpoint programs and urine collection drug testing programs both raise the issue of the constitutionality of random searches and seizures. (At the same time, each type of program implicates quite distinct personal privacy and dignity interests. *See, e.g., Skinner, supra*, 57 U.S.L.W. at 4330 (urine collection programs "require employees to perform an excretory function traditionally shielded by great privacy" and constitute personal searches that will "not [be] characterize[d] . . . as minimal [intrusions] in most contexts"); *von Raab, supra*, 57 U.S.L.W. at 4346 (urine collection drug tests are "much more intrusive than the stop of a car") (Scalia, J., dissenting). And the similarities are such that the general Fourth Amendment principles concerning random searches and seizures developed in this case will likely have a major influence on the development of law regarding random drug testing programs.

As framed by the parties and other *amici curiae* in this case, the debate has focused principally on the degree to which automobile sobriety checkpoints further the admittedly important government interest of deterring drunk driving. The issue of whether an "important government interest [is sufficiently] furthered" by the program in question, *Skinner v. Railway Labor Executives' Ass'n, supra*, 57 U.S.L.W. at 430, is admittedly an important one. But, as this Court has made clear, it is *not* the only issue. The Fourth Amendment evaluation of a random search program must also focus on the question of whether the program works any more than a *minimal* intrusion into individual privacy and dignity interests: if the program does so, the search does *not* pass constitutional muster. *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8; *Skinner v. Railway Labor Executives' Ass'n, supra*, 57 U.S.L.W. at 4330.[2]

---

[2] Although the trial court below explicitly recognized this principle, Petition for *Certiorari* ("Petition"), Appendix ("Pet. App.") at 120a, and both courts below held that the checkpoint program

In this brief, we will explore the principle that the state may *not* constitutionally search or seize on a random basis where that would entail intrusions into personal dignity or privacy that are *not* minimal. In doing so we will focus on the proper framework for analyzing the nature and quantum of the intrusion into privacy worked by random search and seizure programs, rather than on the particular facts and circumstances of this case.

First, we will show that the issue of a program's intrusiveness is not merely one factor in the overall balancing of competing interests: rather, the "minimal intrusion" limitation is a constitutional precondition to any suspicionless search or seizure program.

Second, we will show that strict adherence to this "minimal intrusion" limitation is compelled by the entire structure of Fourth Amendment law; only through this limitation can any permission of suspicionless searches or seizures be reconciled with the remainder of Fourth Amendment doctrine in which *individualized suspicion requirements* define the only circumstances in which significant intrusions will be tolerated. Indeed, we will show that strict adherence to the minimal inclusion requirement is most essential in the context of *random* suspicionless programs, where the fact of randomness may itself substantially heighten the level of intrusion effected by a search or seizure beyond what it would otherwise be.

And, third, we will show that the "minimal intrusion" limitation has, in fact, been at the core of many of the lower court decisions regarding highway sobriety check-

---

here created a potential for intrusions into individual dignity and privacy interests beyond a minimal level, Pet. App. at 21a-22a, 102a-119a, 123a-124a, this basic Fourth Amendment requirement, unfortunately, has, thus far, hardly been explored in any of the filings in this case.

point programs. The result is a body of case law that defines numerous safeguards that reduce the intrusiveness of checkpoint programs, and that are thus indispensable to the constitutionality of any such programs.

ARGUMENT

I. The Fourth Amendment Requires That Suspicionless Search or Seizure Programs Be No More Than Minimally Intrusive Into Privacy and Dignity Interests

A. Petitioners, in framing the issues presented for review, have proceeded on the premise that the constitutionality of random search and seizure programs is determined through an *ad hoc* balancing of the intrusiveness of the seizures in question against the important government interests the program is intended to further. Petition at 16-17 & 22 (citing *Skinner v. Railway Labor Executives' Ass'n*, *supra*, 57 U.S.L.W. at 4328 and *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)). While petitioner is correct that these are the factors which the Fourth Amendment law considers—and (as the cited cases make clear) are thus important in locating the place of a given case in Fourth Amendment jurisprudence—the relevant constitutional doctrine provides far more definite guidelines than petitioner admits. This Court has made it clear that the constitutionality of any suspicionless search or seizure program turns on whether the program works no more than a minimal intrusion on personal privacy and dignity interests.

In *New Jersey v. T.L.O.*, *supra*, the Court explained that "[e]xceptions to the requirement of individualized suspicion are generally appropriate *only* where the privacy interests implicated are minimal." 469 U.S. 325, 342 n.8 (1985) (emphasis added). And, in *Skinner* the Court reaffirmed that "[i]n limited circumstances, *where the privacy interests implicated by the search are minimal* and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of [individualized] suspicion." 57 U.S.L.W. at 4330 (emphasis added). Accordingly, the degree of governmental intrusion into personal privacy interests is not simply one of a number of factors to be weighed in assessing whether a particular suspicionless search or seizure program is justified: rather, to be constitutionally valid suspicionless programs must be *no more than minimally intrusive*.

B. This "minimal intrusion" limitation on suspicionless searches and seizures is deeply grounded in basic Fourth Amendment doctrine. Rarely, if ever, does Fourth Amendment analysis weigh the personal privacy interests and the proffered state interests at issue on a case-by-case basis. Rather, in the main, the governing law consists of a limited number of "objective standards," each establishing the specific quantum of individualized suspicion necessary to sustain a search or seizure that entails a certain level of intrusion. It is precisely because search or seizure programs such as the one here rest on *no* individualized suspicion whatsoever—and are thus so exceptional in Fourth Amendment terms—that the programs have only been permitted where the intrusion into protected privacy interests is minimal.

1. The Fourth Amendment rests on this society's respect for the values of individual "human dignity and privacy," *Schmerber v. California*, 384 U.S. 757, 769-770 (1966), and this society's recognition that "[a]mong deprivations of rights, none is so effective in cowing a population [and] crushing the spirit of the individual'" as that accomplished through unreasonable searches and seizures. *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973) (quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)). *See also Winston v. Lee*, 470 U.S. 753, 758 (1985) ("'the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men'") (quoting *Olm-*

stead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

2. It is in the nature of things that the individual privacy interests protected by the Fourth Amendment will often be juxtaposed to wholly legitimate—and, indeed, pressing and immediate—state interests, and that the searches or seizures in question will usually further the state interest to some degree. That being so, allowing significant governmental intrusion into personal privacy whenever doing so rationally serves an immediate state interest will, over time, produce a society in which the precious expectation of individual dignity and privacy is lost. As this Court stated:

> The needs of law enforcement stand in constant tension with the [Fourth Amendment's] protection of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. [*Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 273.]

Given this, case-by-case balancing of privacy and state interests in Fourth Amendment litigation will inevitably yield results in which "[e]ach step, when taken, appear[s] a reasonable step in relation to that which proceeded it, although the aggregate or end result [will be] one that would never have been seriously considered in the first instance." *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 127 (1973). "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different [Fourth Amendment] cases." *Duniway v. New York*, 442 U.S. 200, 213 (1979).

Indeed, in the Fourth Amendment area *ad hoc* balancing is particularly inappropriate, since the Amendment's purpose is to allow individuals to live their lives secure in their expectations of privacy. Such balancing fails to provide anyone—be they law enforcement officers whose

actions may intrude into privacy or citizens entitled to their privacy—with the clear prospective guidance necessary for the fostering of secure expectations. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 393 (1974) ("[I]f some categorization is not done, if the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity is not restrained, then we shall have a fourth amendment with all of the character and consistency of a Rorschach blot.").

3. All this being so, this Court has proceeded by accommodating the competing interests at stake in Fourth Amendment litigation through a system of categories establishing "objective standard[s]" against which the facts allegedly justifying a particular intrusion into personal privacy can be measured. *Delaware v. Prouse*, *supra*, 440 U.S. at 654. These standards establish "some [specific] quantum of individualized suspicion [as] a prerequisite to a constitutional search or seizure." *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 560. It is by application of these standards to the case at hand that the courts have determined whether "specific, objective facts indicat[e] that society's legitimate interests [sufficiently] require the [search or] seizure of the particular individual." *Brown v. Texas*, *supra*, 443 U.S. at 51.

(a) As a general matter, the relevant "objective standard" is "probable cause," and a search or seizure is only permitted where there is a *high degree of likelihood* that the particular intrusion will uncover evidence which the community needs for its protection. Thus, where a serious intrusion into personal privacy is contemplated, "probable cause" marks the point at which it is "justifiable for the community to demand that the individual give up some part of his interest in privacy and security." *Winston v. Lee*, *supra*, 470 U.S. at 759. *See Skinner v. Railway Labor Executives' Assn'*, *supra*, 57 U.S.L.W. at 4328 ("[e]xcept in certain well-defined circumstances, a

search or seizure . . . is not reasonable unless it is accomplished pursuant to . . . probable cause").

(b) The Court has recognized, however, that in certain classes of cases involving "special needs, beyond the normal need for law enforcement," *Griffin v. Wisconsin*, —— U.S. ——, 55 U.S.L.W. 5156, 5158-5159 & n.4 (June 23, 1987), and involving only "a relatively limited invasion" of privacy, *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (O'Connor, J.), searches may be found "reasonable" on a lesser quantum of individualized suspicion than "probable cause". But even in such cases "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 560. In general, then, no search may be conducted in such "special needs" cases without a showing of "reasonable suspicion." *See, e.g.*, *O'Connor v. Ortega*, *supra* (public employer's search of public employee's desk); *New Jersey v. T.L.O.*, *supra* (teacher's search of student's locker).

(c) This case thus presents an extraordinary claim of government power: the claim of right to search or seize *in the absence of any individualized suspicion.* Operating within a constitutional system of objective standards that calibrate the government's right to intrude into personal privacy and dignity with the likelihood that the intrusion will provide the information the government needs to meet its obligations, the state here admits that its showing will *fail* the most forgiving of these standards.

That being so, the state should only be permitted to proceed where that permission does not undermine the Fourth Amendment's system of safeguards as a whole. And, as we have emphasized, the principal safeguard that this Court has established to prevent such an undermining is the requirement that "[e]xceptions to the requirement of individualized suspicion are generally appropriate *only* where the privacy interests implicated by a search are minimal." *New Jersey v. T.L.O.*, *supra*, 469

U.S. at 342 n. 8 (emphasis added). *Accord*, *Skinner v. Railway Labor Executives' Ass'n*, *supra*, 57 U.S.L.W. at 4330. That safeguard recognizes that to permit *significant* intrusions into personal privacy and dignity, in the absence of individualized suspicion justifying such intrusions, is inconsistent with our basic commitment to individual privacy and dignity.

II. The Role of the Minimal Intrusiveness Requirement In Evaluating Suspicionless—and Especially Random —Searches or Seizures

A. In assessing the intrusiveness of search or seizure programs, this Court has emphasized that each individual's recognized human dignity and privacy interests include her freedom to come and go as she pleases without being subjected to government restraints of any substantial temporal dimensions. The Fourth Amendment inquiry thus focuses, first, on the issue of "objective" intrusion: "the stop itself, the questioning, and the visual inspection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976); *Delaware v. Prouse*, *supra*, 440 U.S. at 656-657. A significant restraint on the individual's normal freedom of movement, standing alone, is generally sufficient to invoke the requirement of probable cause. *See, e.g., United States v. Place*, 462 U.S. 696, 709 (1983) ("length of detention of [airline traveler's] luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause").

The Fourth Amendment also protects individuals from the apprehensions and annoyances entailed by government restraints, and thus the Fourth Amendment inquiry also focuses on the degree to which searches or seizures entail "subjective" or "psychological intrusions". *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 558; *Delaware v. Prouse*, *supra*, 440 U.S. at 657. The constitutional validity of a search or seizure may thus depend in part on its potential for causing reasonable individuals to feel annoyance, anxiety, fright, surprise, stigma, or embarrassment. *See Delaware v. Prouse*, *supra*, 440 U.S. at 657

("anxiety", "fright", "annoyance"); *United States v. Martinez-Fuerte*, *supra*, 428 U.S. 543, 558-560 ("concern", "surprise", "offense").[3] And, even a search or seizure that is exceedingly brief and limited in purpose may still be unconstitutional if carried out in a way that causes such subjective reactions. *See*, *e.g.*, *Delaware v. Prouse*, *supra*.

In this regard, the Court has stressed that intrusiveness is heightened when agents of the state are granted discretionary authority to invade personal privacy. "[T]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . . in order to safeguard the privacy and security of individuals against arbitrary invasions." *Id.* at 653-654. *See also id.* at 655 (Fourth Amendment "assure[s] that the individual's reasonable expectation of privacy is not [to be] subject to the discretion of the official in the field").

B. The office of the usual requirement of "some quantum of individualized suspicion," *United States v. Martinez-Fuerte*, *supra*, 470 U.S. at 759, is to limit the government's discretionary authority to search and seize. The basic questions of who may be searched or seized and, to a large degree, when, where, and how the search or seizure may occur are determined by circumstances having to do with the *individual and her actions*; and *not* circumstances within the control of the state. If and only if the individual excites a reason for governmental inquiry may the state act.

The individualized suspicion requirement protects an individual's subjective expectations of privacy as well. A valid search or seizure is, for most, a rare occurrence which occurs under circumstances which in themselves

[3] *See also United States v. Ortiz*, 422 U.S. 891, 894-895 (1975); *Wyman v. James*, 400 U.S. 309, 320 (1971) (significance of prior notice to reduce surprise); *Terry v. Ohio*, 392 U.S. 1, 25 (1968) ("humiliation").

demonstrate to the individual why she has been selected for scrutiny. Moreover, the individualized suspicion requirement limits not only the circumstances under which a search or seizure may be initiated but also the scope and details of the search or seizure throughout:

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. [*New Jersey v. T.L.O.*, *supra*, 469 U.S. at 341.]

And, to the extent that the intrusions into personal privacy suffered by the individual are limited to what those circumstances justify, the intrusions can be understood as an exercise of sound government discretion which takes privacy interests into account rather than as an exercise of raw governmental power that degrades individual dignity.

C. Where searches are permitted in the absence of objective external facts giving rise to individualized suspicion, decent respect for Fourth Amendment values requires that the government be restricted by "other safeguards . . . to assure that the individual's reasonable expectations of privacy" are preserved. *Delaware v. Prouse*, *supra*, 440 U.S. at 655. In the absence of individualized suspicion, the state's discretion to intrude on particular individuals at particular times and in a particular manner must be so limited as to assure that the intrusion would be accepted as justified to a fair minded individual who suffers the intrusion. The Court has therefore determined that where individualized suspicion is not required searches and "seizures must be carried out pursuant to a plan embodying explicit, neutral limitations" on discretion, *Brown v. Texas*, *supra*, 443 U.S. at 51, and that the level of intrusion be no more than minimal,

New Jersey v. T.L.O., supra, 469 U.S. at 342 n.8. These burdens on the government in the context of random programs are—and should be—heavy ones.

D. By definition, where a random search and seizure is involved, there has been *no* discrete event that directs public inquiry toward the particular individual who will suffer the intrusion.[4] The individual has simply pursued her normal, lawful, daily activities and, for that reason, and the laws of chance, has become subject to a search or seizure. In this case, for example, citizens have become subject to seizure merely by driving on the public roads, an activity engaged in at some point by virtually the entire population.

Since this has been enough to "single out" the individual and subject her to intrusions by the government, the intrusion is likely to appear particularly arbitrary and offensive. And, since a common—rather than uncommon—event is the basis for subjecting the individual to these intrusions, there is a danger that the individual will be *repeatedly* subjected to such intrusion. *See* Pet. App. at 117a n.15 (trial court noted that the statute authorizing sobriety checkpoint programs in this case might subject motorists to repeated checkpoint stops, even on the same trip as they passed from locality to locality). Indeed, random search or seizure programs are

[4] *Compare Skinner v. Railway Labor Executives' Ass'n, supra* (search prompted by individual's involvement in accident); *National Treasury Employees Union v. von Raab, supra* (search prompted by individual's beginning new, safety-sensitive job). *Cf. Almeida-Sanchez v. United States, supra*, 413 U.S. at 272-273 (contrasting search prompted by driver's crossing of international border, where he can "'reasonably [be] requir[ed] . . . to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in,'" and driver lawfully driving within the country in an unexceptional manner) (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925)).

often intentionally designed to *assure* repetition as a means of maximizing deterrent effect.[5]

While these potential increases in the intrusiveness of random searches and seizures may remain within tolerable limits where the intrusiveness of each search or seizure is *truly minimal*, that *cannot* be said where each —literally arbitrary and potentially repetitive—intrusion rises to some level of significance. The prospect of the government randomly removing individuals from their normal and lawful day-to-day rounds, so that those individuals may be suddenly—and potentially repeatedly—subjected to *substantial* intrusions into their privacy and dignity is simply not consistent with the Constitution's vision of a free society.

E. The concept of a "minimal intrusion" is not self defined. Assessing whether a particular level of intrusion is "minimal," requires a referent: those "expectation[s] of privacy" that our society "is prepared to recognize as legitimate." *New Jersey v. T.L.O., supra*, 469 U.S. at 338. That assessment must begin with an examination of the normal expectations of privacy—and the normal restrictions on those expectations—associated with a certain activity. Where an activity is well-understood to be subject to certain state restrictions on personal freedom and privacy, and those restrictions are well-accepted by the society, the individuals who engage in the activity have reasonable expectations of privacy that are to that

[5] Employee urine collection drug testing programs are illustrative. In virtually all of the federal random testing programs, *see* n.1, *supra*, employees are subjected to a permanent regime of repeated testing designed to continue throughout their work lives, no matter how often they have taken the test and passed; employees who find the experience embarrassing and distasteful are thus required to reexperience it innumerable times, each time on a random basis. In contrast, in the *Skinner* post-accident testing program and the *von Raab* pre-employment testing program, tests were required only upon the occurrence of a rare event making repetition highly unlikely.

extent—albeit *only* to that extent—reduced. *See, e.g., Skinner v. Railway Labor Executives' Ass'n, supra,* 57 U.S.L.W. at 4330, 4331 (assessing reasonable expectations of privacy of railroad workers in light of long-standing restrictions on their privacy); *New Jersey v. T.L.O., supra,* 469 U.S. at 338-339 (school children); *O'Connor v. Ortega, supra,* 480 U.S. at 721-722 (government employees).

Clearly an individual's reasonable privacy expectations when driving are more limited than in certain other contexts, *e.g.*, when at home. *South Dakota v. Opperman,* 428 U.S. 364, 367-369 (1976). And, accordingly, an intrusion that might be deemed "significant" in the latter context might be deemed "minimal" in the former. Most obviously, driving is a public activity, conducted in public view. Moreover, given the mobility and potential threat to the safety of others inherent in automobile travel, our society has imposed a number of limitations on drivers' freedom of movement and privacy. To note but a few examples, drivers are subject to well-accepted and long-standing licensing requirements, vehicle inspection requirements, and myriad rules of the road restricting their freedom of movement. *Id.*

On the other hand, as countless cases in this Court demonstrate, motorists in our society retain broad and well-accepted expectations of privacy that the state has never been permitted to invade. *See, e.g., Delaware v. Prouse, supra*; *United States v. Ortiz, supra*; *Almeida-Sanchez v. United States, supra.* This balance of expectations of privacy and of accepted limitations on privacy thus forms the context for assessing the degree to which a given search or seizure represents a "significant" or a "minimal" intrusion on a driver's reasonable privacy expectations.

The proper approach is thus clear, even if it does not necessarily yield its results with mechanical precision. Assessments of the seriousness of an intrusion must be

firmly rooted in current social reality, reflecting the generally accepted privacy expectations of citizens in a free society as they go about the rounds of their day-to-day activities.

III. Reviewing Highway Sobriety Checkpoint Programs To Assure That They Impose No More Than Minimal Intrusions

A. There has now been sufficient litigation on the constitutional validity of highway sobriety checkpoint programs—and similar random automobile stop programs—to give substantial guidance on the meaning of "minimal intrusion" in this context. A review of the cases reveal that a number of restrictions on government discretion have been almost universally viewed as essential to their constitutionality.

First, it is clear that random, suspicionless automobile checkpoint programs only meet the Constitution's requirements where the program assures that objective intrusions will be confined to *momentary stops accompanied by unthreatening verbal inquiries and the most casual visual examination. Compare United States v. Martinez-Fuerte, supra,* 428 U.S. at 558 (upholding auto checkpoint stop involving "only a brief detention"); *Commonwealth v. Trumble,* 483 N.E. 2d 1102, 1105 (Mass. 1985) (upholding auto checkpoint stop of less than one minute); *State v. Superior Court,* 691 P.2d 1073, 1077 (Ariz. 1984) (same); *with United States v. Ortiz, supra,* 422 U.S. at 894 (refusing to uphold random car searches, as distinct from brief stops, because of "the invasion of privacy that a search entails"); *People v. Scott,* 473 N.E. 2d 1, 2 (NY 1984) (police checkpoints may randomly stop cars for brief questioning but may *not* randomly administer sobriety tests); *Patchoque-Medford Teachers Cong. v. Board of Educ.,* 510 N.E. 2d 325, 331 (NY 1987) (at auto checkpoint "police could only stop and inquire but could not give sobriety tests" without reasonable suspicion of intoxication). *See generally* Jacobs & Strossen,

Mass Investigations Without Individualized Suspicion, 18 U.C. Davis L.R. 595, 672 (1985) (noting the extreme brevity of checkpoint stops that have been approved).

Indeed, more than 60 years ago, this Court rejected the proposition that automobile checkpoints could be used to accomplish searches entailing significant intrusions on persons. *See Carroll v. United States*, 267 U.S. 132, 153-154 (1925) ("It would be intolerable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.")

Second, the case law establishes too that the process of selecting individuals for stops must be an *entirely objective process*, wholly removed from the discretion of officers in the field, *Delaware v. Prouse*, *supra*, that the program *must not "single out" individuals from the general population of drivers*, and that the state must make the routine nature of the stop manifest and avoid any action that would be perceived as harassing. *See United States v. Ortiz*, *supra*, 422 U.S. at 894-895 (ability to see that others are also subject to a search makes one "much less likely to be frightened or annoyed by the intrusion"; where "only a few are singled out . . . [they] may find the searches especially offensive"). *See also United States v. Maxwell*, 565 F.2d 596, 598 (9th Cir. 1977) (auto stop invalid where cars cannot perceive routine nature of stops); *Stark v. Perpich*, 590 F.Supp. 1057, 1061 (D. Minn. 1984) (drivers at routine stops must be told of routine nature of stop).

Third, most of those state courts that have upheld sobriety checkpoint stops have done so only after imposing a number of additional, carefully considered limitations to assure that the checkpoints' operations reduce, as far as possible, such subjective intrusions as surprise, confusion, and annoyance to a minimal level. *See, e.g.*,

Webb v. State, 739 S.W.2d 802 (Tex. Cr. App. 1987) (police at checkpoint must avoid causing traffic congestion and thus prolonging detention; they must also make their authority and purpose clear to all drivers); *Commonwealth v. Amaral*, 495 N.E.2d 276 (Mass. 1986) (police checkpoint must be conducted at a well-lit location and must provide warning signs to prevent surprise and sufficient space for cars comfortably to pull over); *State v. Deskins*, 673 P.2d 1174, 1185 (Kan. 1983) (listing numerous factors that will be examined in evaluating intrusiveness of a checkpoint); *State v. Hilleshiem*, 291 N.W. 2d 314 (Iowa 1980) (same).

Only because most random sobriety checkpoint programs have contained these sets of safeguards has the prevailing view been that they meet constitutional muster. These safeguards, at a minimum, should be viewed as essential to any characterization of such programs as minimally intrusive. In deciding this case, this Court should demand no less.

B. Many of the inquiries conducted by the trial court are in accord with the approach just described. *See* Pet. App. 104a (all stops of very short duration); *id.* at 111a (no discretion regarding selection of motorists for stops); *id.* at 112a-113a (official discretion limited in numerous other ways); *id.* at 107a-108a (advance warning to motorists provided in order to reduce surprise and confusion). On the other hand, a number of the trial court's inquiries reflect a view of "minimal intrusion" that has less uniform support in the decisions of other courts. *See id.* at 105a-110a (significant intrusion because motorists did not know of exact location of checkpoint and did not know of right to turn around to avoid checkpoint once seeing it); *id.* at 115a (significant intrusion because checkpoint's purpose involved "search for violators of criminal law"). On these latter bases the trial court found the checkpoint program unconstitutional.

For the reasons stated at the outset, the AFL-CIO takes no position on the correctness of the *particular* judgments made by the trial court—and upheld by the Court of Appeals, Pet. App. 20a-21a—regarding the intrusiveness of this checkpoint program. And, thus, the AFL-CIO supports neither party in this case. Rather, it is our submission that Fourth Amendment law clearly does mandate that this Court, in assessing this program, inquire into whether its intrusiveness into personal privacy in any respects exceeds minimal levels, and that this Court find the program unconstitutional if it finds that the program does entail any such intrusions.

CONCLUSION

For the foregoing reasons this Court should determine whether the program in question entails any intrusions into personal dignity or privacy interests beyond a truly minimal level, and should reject the program as unconstitutional if it entails any intrusions beyond that level.

Respectfully submitted,

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street N.W.
Washington, D.C. 20006
(202) 637-5340

MOTION FILED
NOV 16 1989

No. 88-1897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and
COL. R. T. DAVIS, Director of the
Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW and JACK WELBORN,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ANDREW L. FREY
ERIKA Z. JONES
LAWRENCE C. MARSHALL
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20036
(202) 463-2000
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1897

MICHIGAN DEPARTMENT OF STATE POLICE and
COL. R. T. DAVIS, Director of the
Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW and JACK WELBORN,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 36.1 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of the brief. Respondents have denied consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Amici are concerned that unless the Court reverses the judgment below, the progress that state and local governments have begun to make in their fight against drunk driving will be set back severely. *Amici*'s members have worked over the past decade to create multi-faceted programs designed to educate the public about the horrors of drunk driving and to deter motorists from driving drunk. Some of *amici*'s members have incorporated sobriety checkpoints into their programs and others have not. But all consider it imperative that they be allowed to maintain the flexibility to decide whether sobriety checkpoints can play a useful role as part of their comprehensive programs to curb drunk driving within their particular jurisdictions.

Amici are also concerned about the aggressive approach that the Michigan courts took in assessing the State's determination that sobriety checkpoints are an effective tool in the fight against drunk driving. The courts below showed absolutely no deference to the State's decision, and instead relied exclusively on a single expert witness who called the program's efficacy into question. It was in the name of enforcing the dictates of the federal Constitution that the Michigan courts conducted this intensive second-guessing of the State's assessment that a particular law enforcement technique would deter criminal conduct. The courts' approach, however, was fundamentally at odds with the core principles of representative democracy that make that Constitution so unique. *Amici* submit that this Court should use this opportunity to declare once again the appropriate role for the courts in assessing a determination by a politically accountable branch that a particular law enforcement technique is likely to prove effective.

Because the issues presented by this case are of exceptional importance to *amici* and their members, *amici* respectfully move for leave to file the attached brief in support of petitioners.

Respectfully submitted,

ANDREW L. FREY
ERIKA Z. JONES
LAWRENCE C. MARSHALL
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20036
(202) 463-2000
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

November 16, 1989

QUESTION PRESENTED

Whether the Fourth Amendment prohibits a State from instituting a sobriety checkpoint program when an official State Task Force has determined that the program is a potentially vital element in the State's comprehensive drunk driving program, and when the checkpoint program affords police absolutely no discretion in deciding which motorists to stop and causes only minimal interference with lawful motorists' passage.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. SOBRIETY CHECKPOINTS ARE WIDELY RECOGNIZED AS IMPORTANT TOOLS IN STATE AND LOCAL GOVERNMENTS' BATTLE AGAINST DRUNK DRIVING	4
II. STRUCTURED USE OF SOBRIETY CHECKPOINTS DOES NOT VIOLATE THE FOURTH AMENDMENT'S PROHIBITION OF UNREASONABLE SEIZURES	7
A. The Fight Against Drunk Driving Is A Matter Of Paramount Public Concern	8
B. Sobriety Checkpoints Advance The Public Interest In Deterring And Preventing Driving Under The Influence Of Alcohol	9
1. *The Michigan courts erred in demanding that the State present unequivocal empirical evidence to support the State's conclusion that sobriety checkpoints are important elements in its campaign against drunk driving*	9
2. *The Michigan courts erred in demanding that the State demonstrate the unavailability of other less-intrusive alternatives*	13

TABLE OF CONTENTS—Continued

	Page
3. *There is more than ample evidence that sobriety checkpoints are effective elements in anti-drunk-driving programs*	16
C. Structured Sobriety Checkpoints Involve A Minimal Degree Of Intrusion And Interference	22
1. *The sobriety checkpoints at issue here do not leave officers any discretion in determining which cars to stop*	23
2. *Sobriety checkpoints result in only minimal objective and subjective intrusion into Fourth Amendment interests*	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
Bell v. Wolfish, 441 U.S. 520 (1979)	22
Brown v. Texas, 443 U.S. 47 (1979)	7, 8, 23, 24
California v. LaRue, 409 U.S. 109 (1972)	13
Camara v. Municipal Court, 387 U.S. 523 (1967)	20, 29
City of Newport v. Iacobucci, 479 U.S. 92 (1986) (per curiam)	13
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	10
Commonwealth v. Leninsky, 360 Pa. Super. 49, 519 A.2d 984 (1986)	19
Commonwealth v. Tarbert, 517 Pa. 277, 535 A.2d 1035 (1987)	19
Delaware v. Prouse, 440 U.S. 648 (1979)	14, 22, 23, 24, 25, 27
Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984)	17
Gregg v. Georgia, 428 U.S. 153 (1976)	11
Ingersoll v. Palmer, 43 Cal.3d 1321, 241 Cal. Rptr. 42, 743 P.2d 1299 (1987)	9-10
Little v. State, 300 Md. 485, 479 A.2d 903 (1984)	10, 29
Lockhart v. McCree, 476 U.S. 162 (1986)	16
Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985), cert. denied, 475 U.S. 1084 (1986)	10
Marshall v. United States, 414 U.S. 417 (1974)	15
National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989)	*passim*
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)	12
New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981)	13
Pennsylvania v. Mimms, 434 U.S. 106 (1977)	7
People v. Bartley, 109 Ill.2d 273, 486 N.E.2d 880 (1985), cert. denied, 475 U.S. 1068 (1986)	10, 12, 19, 22
People v. Scott, 63 N.Y.2d 518, 483 N.Y.S.2d 649, 473 N.E.2d 1 (1984)	10, 28
Skinner v. Railway Labor Executives' Ass'n, 109 S.Ct. 1402 (1989)	*passim*
South Dakota v. Neville, 459 U.S. 553 (1983)	8

TABLE OF AUTHORITIES—Continued

Page

State v. Garcia, 481 N.E.2d 148 (Ind. App. 1st Dist. 1985), aff'd, 500 N.E.2d 158 (Ind. 1986) ..12-13, 21
State v. Martin, 145 Vt. 562, 496 A.2d 442 (1985) .. 10
State v. Pima County Superior Court, 143 Ariz. 45, 691 P.2d 1073 (1984) 9
Stone v. Powell, 428 U.S. 465 (1976) 13
United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 22, 26, 27
United States v. Hernandez, 739 F.2d 484 (9th Cir.), cert. denied, 469 U.S. 1021 (1984) 28-29
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) .....*passim*
United States v. Ortiz, 422 U.S. 891 (1975) 27
United States v. Villamonte-Marquez, 462 U.S. 579 (1983) 25

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. IV .....*passim*
U.S. Const. Amend. XXI 13
Mich. Const. Art. I, § 11 3

STATUTES AND LEGISLATIVE MATERIALS:

Alcohol, Drugs and Driving, Hearing Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources, 97th Cong., 2d Sess. (1982) 8
Michigan Act No. 348, Public Acts of 1984 (Dec. 26, 1984) 2

MISCELLANEOUS:

Allen, Hogge, Schwartz & Stein, *The Effects of Alcohol on the Driver's Decision-Making Behavior: Final Report* (1978) 20
Dickman, *Sobriety Checkpoints for DWI Enforcement: A Review of Current Research* (DOT/NHTSA 1987) 18
J. Ely, *Democracy and Distrust* (1980) 15
Epperlein, *The Use of Sobriety Checkpoints As a Deterrent: An Impact Assessment* (State of Arizona Statistical Analysis Center 1985) 6

TABLE OF AUTHORITIES—Continued

Page

Governor's Alcohol and Highway Safety Task Force, *DWI: Driving While Intoxicated* (New York 1981/1982) 6
The Governor's Task Force on Alcohol Abuse and Highway Safety, *Alcohol Abuse and Highway Safety in Massachusetts* (March 1982) 6
The Governor's Task Force to Combat Drunk Driving, *Action Plan to Combat Drunk Driving in Virginia: A Preventable Loss* (July 1983) 6
Harris, Dick, Casey & Jarosz, *The Visual Detection of Driving While Intoxicated* (DOT/NHTSA 1980) 19
Highway Safety Policy Research Project, *An Assessment of Drunk Driving Policies in Texas and Other States* (1985) 6
Hingson, *1987 Massachusetts/New Hampshire Road Block Surveys* (Massachusetts Governor's Highway Safety Bureau 1987) 6, 18
Interim Report of the Illinois DUI Task Force (Dec. 1984) 6
Lacey & Lucke, *Enforcement and Public Information Strategies for DWI General Deterrence: The Boise City, Idaho Experience: Final Report* (DOT/NHTSA 1987) 16, 18
Lacey, Stewart, Marchetti, Popkin, Murphy, Lucke & Jones, *Enforcement and Public Information Strategies for DWI General Deterrence: ARREST DRUNK DRIVING—The Clearwater and Largo, Florida Experience: Final Report* (DOT/NHTSA 1986) 16
W. LaFave, *Search and Seizure* (2d ed. 1987) 18
Legislative Commission on Expenditure Review—State of New York, *Drinking Driver Program* (1979) 20
Lynn, *An Evaluation of Thirteen Local Selective Enforcement Projects Designed to Reduce Drunken Driving in Virginia* (Virginia Highway & Transportation Research Council 1985) .. 18
Michigan Drunk Driving Task Force, *Final Report* (1985) 2, 7, 18, 29

TABLE OF AUTHORITIES—Continued

	Page
Moskowitz & Robinson, *Effects of Low Doses of Alcohol on Driving-Related Skills: A Review of the Evidence* (DOT/NHTSA 1988)	20
National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* (1986)	7
National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* (1987)	4, 8
National Highway Traffic Safety Administration, Digest of State Alcohol-Highway Safety Related Legislation (6th ed. 1988)	20
National Highway Traffic Safety Administration, *Incentive Grant Criteria for Alcohol Traffic Safety Programs*, 48 Fed. Reg. 5545 (Feb. 7, 1983)	6
National Highway Traffic Safety Administration, *The Use of Safety Checkpoints for DWI Enforcement* (DOT HS 806-476, 1983)	5, 18, 29
National Transportation Safety Board, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations* (1984)	6
Presidential Commission on Drunk Driving, *Final Report* (1983)	5, 6
Soble, *Clearing the Roadblocks to Sobriety Checkpoints*, 21 Mich. J. Law Ref. 489 (1988)	29
United States Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1989* (1989)	8
United States Department of Justice, *Sourcebook on Criminal Justice Statistics 1988* (1989)	8
Vingilis & Salutin, *A Prevention Programme for Drinking Driving*, 12 Accid. Anal. & Prev. 267 (1980)	19
Voas, Rhodenizer & Lynn, *Evaluation of Charlottesville Checkpoint Operations: Final Report* (DOT/NHTSA 1985)	16, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1897

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

Like so many other state and local governments, Michigan has determined that traditional law enforcement techniques alone are inadequate to deal with the problem of drunk driving. In 1984, the Michigan legislature created the Michigan Drunk Driving Task Force, consisting of representatives from the State's executive, legisla-

tive, and judicial branches, as well as various citizen representatives. The Task Force was charged with the responsibility of reviewing and making recommendations to the governor and legislature "relative to all aspects of the drunk driving problem in Michigan." Act No. 348, Public Acts of 1984 (Dec. 26, 1984). In 1985, the Task Force issued its report, which contained thirty-five recommendations for action, including the recommendation that sobriety checkpoints be used on a trial basis. Michigan Drunk Driving Task Force, *Final Report* 26 (1985). In his January 1986 State of the State Address, Michigan Governor James J. Blanchard called upon the Department of State Police to implement the Task Force's recommendation regarding sobriety checkpoints.

Before instituting the trial checkpoint program, the Department of State Police established an advisory committee to develop guidelines for the constitutional implementation of the program. These guidelines significantly constrain police discretion in determining where checkpoints will be located and in operating the checkpoints. For example, the checkpoint sites are chosen on the basis of "criteria, as approved by the Director of the Department of State Police, which consider the previous alcohol and drug experience per time of day and day of week as identified by arrests and/or Michigan Accident Location Index data." Pet. App. 148a. The guidelines are also explicit and detailed in prescribing the officers' and supervisors' responsibilities.[1]

With these guidelines in force, the Department announced its plan to conduct the first of its checkpoint programs on May 17, 1986. One day before that checkpoint was established, respondents filed this action in the Wayne County Circuit Court, alleging that the proposed checkpoint program violated both the federal and state Constitutions, and requesting a preliminary injunction against petitioners. On May 17, Michigan conducted its

[1] Some details of these constraints are described *infra* pages 23-24, 27-28.

one and only checkpoint operation. The checkpoint operated for less than an hour due to inclement weather; during that time 126 motorists were stopped for an average period of twenty-five seconds each, and two motorists were arrested for driving under the influence of alcohol.

After holding hearings on the program's constitutionality in late May and early June 1986, the trial court entered a permanent injunction barring Michigan from utilizing sobriety checkpoint programs. The primary basis for the court's determination that sobriety checkpoint programs violate both the federal and state constitutions was the testimony of respondents' expert, H. Lawrence Ross, a Professor of Sociology at the University of New Mexico. The court was persuaded that sobriety checkpoint programs are not particularly effective tools in combating drunk driving. The court also believed that the temporary location of the checkpoints added to the fear and fright that law-abiding motorists would experience.

The Michigan Court of Appeals affirmed, holding that the trial court's determinations were not clearly erroneous. The court modified the holding, however, declaring that the ruling was based solely on the federal Constitution. Pet. App. 24a-25a.

SUMMARY OF ARGUMENT

Over the last decade, sobriety checkpoint programs have become a recognized tool in battling drunk driving. A series of federal and state commissions and task forces has concluded that checkpoint programs can play a critical role as part of state and local governments' comprehensive anti-drunk-driving programs.

The Michigan courts overstepped their appropriate role when they rejected this consensus and declared that they were not convinced that sobriety checkpoint programs are very effective tools in battling drunk driving. In evaluating the constitutionality of a neutral questioning or testing program, such as the ones this Court has upheld with respect to alien checkpoints and drug testing, a court, of course, must satisfy itself that the program reasonably

advances the government's stated interests. But a court should not demand, and this Court has never demanded, unqualified empirical evidence to support a State's conclusion that the technique will work or that it is an important facet of the State's program. Nor should a court require the State to show that no other program or combination of programs could accomplish the State's goal in some less intrusive way.

The Michigan courts also exaggerated the level of intrusion caused by structured sobriety checkpoints. Because these programs are designed to eliminate police discretion in deciding whom to stop, sobriety checkpoints do not raise the classic Fourth Amendment concern with the possible abuse of unbridled discretion. Moreover, the brief, public, and routine stops involved in this case do not raise the specter that individual motorists will experience fear or fright, as they might upon being pulled over by an officer conducting a roving patrol.

ARGUMENT

I. SOBRIETY CHECKPOINTS ARE WIDELY RECOGNIZED AS IMPORTANT TOOLS IN STATE AND LOCAL GOVERNMENTS' BATTLE AGAINST DRUNK DRIVING.

Since the beginning of the automobile age, state and local governments have been fighting an uphill battle against the horrors of drunken driving. The death and injury tolls are astounding. In 1986, for example, approximately 24,000 people died in alcohol-related car accidents. See National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* 6 (1987). In recent years, governments have become increasingly active in attempting to design programs to change public attitudes toward the abominable combination of alcohol and automobiles, and to deter those who might be inclined to drive drunk. The challenge that state and local governments face is great, for, as the Presidential Commission on Drunk Driving concluded, "driving under the influence is basically a State and local problem for which State and local solutions must be found." Presidential Commission on Drunk Driving, *Final Report* 4 (1983).

Sobriety checkpoints are one of the critical tools that many state and local governments have utilized in combating drunk driving. These checkpoints have been used in conjunction with a variety of other state and local programs designed to improve public awareness of the scope of the drunk driving problem and to bolster enforcement of drunk driving laws. Many other facets of these programs are less costly than sobriety checkpoints. Yet it has been widely recognized that sobriety checkpoints serve a unique function in educating the public about society's resolve against drunk driving, and in particular, enhancing a drunk driver's perception that he may be caught. Focusing on the value of general deterrence programs—"those designed to raise the perceived risk of arrest and sanctioning by the vast majority of drunk drivers who are never arrested"—a National Highway Traffic Safety Administration ("NHTSA") study concluded that "the general deterrence approach has the greatest potential for achieving a substantial, short-term reduction in alcohol-related crashes. . . . The general deterrence approach is also an essential aspect of any long-term solution to the problem." NHTSA, *The Use of Safety Checkpoints for DWI Enforcement* 1 (DOT HS 806-476, 1983). That same study describes the pivotal role that sobriety checkpoints play in the deterrence process, concluding that "safety checkpoints can provide an important component of an effective enforcement system designed to raise the perceived probability of apprehension for DWI." *Id.* at 2.

This NHTSA study is but one in a long series of commissions and studies that has recognized the unique value of sobriety checkpoints in deterring drunk driving. For example, on the federal level, the Presidential Commission on Drunk Driving urged state and local governments to "take a *general deterrence approach*" to the drunk driving problem, and to use sobriety checkpoints "to achieve

a high perception of risk of detection for driving under the influence." *Final Report* at 5, 15 (emphasis in original). Similarly, NHTSA has recognized that roadside checks have been successfully used in various States and "are particularly effective in increasing the public perception of the risk of being caught for drunk driving." NHTSA, *Incentive Grant Criteria for Alcohol Traffic Safety Programs*, 48 Fed. Reg. 5545, 5550 (Feb. 7, 1983). The National Transportation Safety Board ("NTSB") has likewise concluded that sobriety checkpoint procedures are "potentially effective deterrent measures that warrant broader application by the States." NTSB, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations* 21 (1984). Many state commissions have reached similar conclusions about the efficacy of sobriety checkpoints.[2]

Consistent with this national consensus about the need to develop additional tools to deal with the drunk driving problem, the Michigan legislature created the Michigan Drunk Driving Task Force. The Task Force conducted five public hearings to obtain information and to gauge reaction to the proposed use of sobriety checkpoints. To evaluate whether sobriety checkpoints should be instituted in Michigan, the Task Force conducted a survey of Michigan drivers in which the majority of respondents "reported that they would be less likely to drink as much

[2] See, *e.g.*, Hingson, *1987 Massachusetts/New Hampshire Road Block Surveys* (Massachusetts Governor's Highway Safety Bureau 1987); Highway Safety Policy Research Project, *An Assessment of Drunk Driving Policies in Texas and Other States* 34 (1985); Epperlein, *The Use of Sobriety Checkpoints As a Deterrent: An Impact Assessment* (State of Arizona Statistical Analysis Center 1985); *Interim Report of the Illinois DUI Task Force* 12-13 (Dec. 1984); The Governor's Task Force to Combat Drunk Driving, *Action Plan to Combat Drunk Driving in Virginia: A Preventable Loss* 37 (July 1983); The Governor's Task Force on Alcohol Abuse and Highway Safety, *Alcohol Abuse and Highway Safety in Massachusetts* 39-40 (March 1982); Governor's Alcohol and Highway Safety Task Force, *DWI: Driving While Intoxicated* 11 (New York 1981/1982).

when driving if sobriety checkpoints were implemented in Michigan." Michigan Drunk Driving Task Force, *Final Report* 13 (1985). The Task Force also surveyed each of the fifty States to assess the experience that other state and local governments have had with sobriety checkpoints. With the benefit of this information, the Task Force recommended "that in concert with the 1983 Report of the Presidential Commission Against Drunk Driving, the National Transportation Safety Board, and the National Commission On Drunk Driving, the use of temporary sobriety checklanes be used on a trial basis." *Id.* at 26. According to the data gathered by the Task Force, Michigan thus became the thirty-sixth State in which state or local government officials have used checkpoints in battling drunk driving.[3]

II. STRUCTURED USE OF SOBRIETY CHECKPOINTS DOES NOT VIOLATE THE FOURTH AMENDMENT'S PROHIBITION OF UNREASONABLE SEIZURES.

This Court has repeatedly recognized that the "reasonableness of seizures that are less intrusive than a traditional arrest . . . depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Brown v. Texas*, 443 U.S. 47, 50 (1979) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)). In *Brown*, the Court identified three factors that enter this balance: "[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty." 443 U.S. at 51. All three of these factors weigh heavily in favor of the reasonableness of Michigan's sobriety checkpoint program.

[3] A report of the National Commission Against Drunk Driving suggests that Michigan's count was low and that checkpoints have been utilized, to some extent, in 50 States and Territories. National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* 4 (1986).

A. The Fight Against Drunk Driving Is A Matter Of Paramount Public Concern.

It is surely unnecessary to elaborate on just how momentous a threat drunk driving poses to public health and safety. As this Court has observed, "[t]he carnage caused by drunk drivers is well documented and needs no detailed recitation." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). Although the numbers are known to be enormous, it may be difficult to comprehend the magnitude of the statistics standing alone. Thus, comparing them with some other recognized threats helps put the gravity of the danger in perspective. In 1986, there were 24,000 alcohol-related automobile deaths in the United States as compared to 20,610 murders.[4] Similarly, during 1986 and 1987 more Americans lost their lives in alcohol-related automobile accidents than were killed in the entire course of the Vietnam war.[5] As would be expected, of all the courts that have evaluated sobriety checkpoints under the *Brown* balancing test, not one has ever questioned the magnitude of the drunk driving problem or the critical importance of establishing effective measures to deter drunk drivers.[6]

---

[4] See United States Department of Justice, *Sourcebook on Criminal Justice Statistics 1988* at 427 (1989); National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving* 6 (1987).

[5] See United States Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1989* at 336 (1989); see generally *Alcohol, Drugs and Driving, Hearing Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. (1982).

[6] The gravity of the interest in keeping alcohol-impaired drivers off the road is far more acute than the Customs Service's interest in not promoting officers who use drugs, which the Court found to be "substantial" in *National Treasury Employees Union v. Van Raab*, 109 S.Ct. 1384, 1390 (1989). Unfortunately, Justice Scalia's observation that there was no evidence "of *even a single instance* in which any of the speculated horribles actually occurred" (*id.* at 1400 (Scalia, J., dissenting) (emphasis in original)), is not applicable to the devastating effects of alcohol-related traffic accidents, which claim more than 60 lives a day.

B. Sobriety Checkpoints Advance The Public Interest In Deterring And Preventing Driving Under The Influence Of Alcohol.

Given the strong national consensus that has developed about the utility of sobriety checkpoints, it seems obvious that Michigan had more than a reasonable basis for concluding that such checkpoints are effective elements in the battle against drunk driving. Yet the Michigan Court of Appeals held that the trial court was "not clearly erroneous" in concluding that sobriety checkpoints are not effective long-term deterrents. Pet. App. 12a. This mistaken conclusion about the ineffectiveness of sobriety checkpoints formed the core of the lower courts' reasoning. This core was severely flawed, though, because the Michigan courts not only grossly overstepped the bounds of the appropriate judicial role in overriding a State's determination that a law enforcement device would be an effective component of a comprehensive deterrence program, but also misapprehended the state of knowledge on the subject of sobriety checkpoints.

1. *The Michigan courts erred in demanding that the State present unequivocal empirical evidence to support the State's conclusion that sobriety checkpoints are important elements in its campaign against drunk driving.*

The Michigan courts fundamentally misconceived the limited role that the Constitution affords them in examining the efficacy of sobriety checkpoints. What the courts should have done was to ask whether there was reasonable support for the State's conclusion that a sobriety checkpoint program would help advance the goal of deterring and detecting drunk driving. Had the courts asked the question in that way, they most assuredly would have decided, as so many other courts have,[7] that the

---

[7] See, *e.g.*, *State v. Pima Cty. Superior Ct.*, 143 Ariz. 45, 48-49, 691 P.2d 1073, 1076-1077 (1984); *Ingersoll v. Palmer*, 43 Cal.3d

sobriety checkpoint program was a reasonably effective facet of an overall anti-drunk-driving program. Instead, the Michigan courts engaged in full-fury scrutiny of the State's justifications for sobriety checkpoints, ultimately declaring that there was insufficient empirical evidence to support the State's studied conclusion that sobriety checkpoints can serve as long-term deterrents to drunk driving.[8]

This super-strict scrutiny of the State's determination that sobriety checkpoints are a worthwhile measure is inconsistent with the role that courts in our form of government should play in assessing the reasonableness of a nondiscretionary program such as this. For example, in *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989), this Court upheld Federal Railroad Administration ("FRA") regulations that require alcohol and drug testing of all railway personnel involved in certain train accidents. In assessing whether the tests promoted the FRA's goals of deterring alcohol and drug use and discovering the cause of accidents, the Court concluded that the regulations were "reasonably related to the Government objectives that support them." *Id.* at 1421. In keeping with this tone of inquiry, the Court specifically refused to "second-guess the reasonable conclusions drawn by the FRA after years of investigation and study." *Id.* at 1419 n.9. In contrast, the Michigan courts in this case

1321, 1339-1341, 241 Cal. Rptr. 42, 55, 743 P.2d 1299, 1311 (1987); *People v. Bartley*, 109 Ill.2d 273, 286-287, 486 N.E.2d 880, 886 (1985), cert. denied, 475 U.S. 1068 (1986); *Little v. State*, 300 Md. 485, 505-506, 479 A.2d 903, 913 (1984); *People v. Scott*, 63 N.Y.2d 518, 526-527, 483 N.Y.S.2d 649, 653, 473 N.E.2d 1, 4 (1984); *Lowe v. Commonwealth*, 230 Va. 346, 352, 337 S.E.2d 273, 277 (1985), cert. denied, 475 U.S. 1084 (1986); *State v. Martin*, 145 Vt. 562, 569, 469 A.2d 442, 447 (1985).

[8] At one point, the trial court seemed to demand something "close to unqualified support" for the State's conclusion that sobriety checkpoints are effective. Pet. App. 87a. This unyielding approach departs markedly from this Court's evaluation of regulations affecting even First Amendment rights. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (city may rely on evidence that it "reasonably believed to be relevant to the problem that the city addresses.").

showed absolutely no deference to the State's reasoned conclusions, or to the assessments of the dozens of federal and state commissions and task forces that have found sobriety checkpoints to be important elements in the anti-drunk-driving campaign.

The notion that a court should take it upon itself to assess independently the efficacy of a single element of a State's program is especially problematic when the question turns on whether the element, properly analyzed in its programmatic context, has a sufficient deterrent impact. Whether a given procedure does or does not deter behavior is always a difficult question, one that often divides the social science and academic communities, and is well outside the confines of appropriate judicial decisionmaking. Indeed, dealing with no less critical an issue than the constitutionality of capital punishment, the plurality in *Gregg v. Georgia*, 428 U.S. 153 (1976), observed that "[a]lthough some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view." *Id.* at 185 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). Hence, the plurality concluded that "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Id.* at 186.[9]

The importance of allowing state and local governments to adapt programs to suit their own citizens and circumstances, as described in *Gregg*, or even to experiment with new programs, is a central theme in our federal system.

[9] It is of no constitutional import that Michigan's decision to implement sobriety checkpoints at this time was an executive branch decision, as opposed to a legislative determination. The trial court held, as a matter of Michigan law, that the legislative branch delegated authority to the police to adopt checkpoint programs. Pet. App. 40a-42a.

As Justice Brandeis wrote, "one of the happy incidents of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory . . . . This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must ever be on our guard, lest we erect our prejudices into legal principles." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The Michigan courts ignored these principles when they afforded the State absolutely no flexibility to experiment with sobriety checkpoints. Moreover, by enjoining a test program designed to assess the effectiveness of sobriety checkpoints *in Michigan*, the courts made it impossible for the State to gather the very evidence that the courts would have considered most relevant to the constitutional issue.

The catch-22 nature of demanding more empirical evidence but forbidding the State to gather it is unmistakable. Under this approach, no State could ever pioneer in the use of new law enforcement techniques because, by definition, such programs would not yet have been proven useful. Under this theory, the checkpoints that the Court held to be constitutionally valid in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), must have been operating unconstitutionally up until the time that enough aliens had been detected to provide an empirical basis for the checkpoint's utility. Such an approach is absurd. The constitutionality of sobriety checkpoints and other innovative law enforcement techniques must not be made to turn on the fortuity of whether a plaintiff attacks them before or after they have had a chance to demonstrate their value. As the Illinois Supreme Court noted in upholding the use of sobriety checkpoints: "With the cost in human life so high, we do not believe that we would be accurately balancing the factors involved were we to delay approval of this technique and condone the further loss of life while the statistics were being developed." *People v. Bartley*, 109 Ill.2d at 286, 486 N.E.2d at 886; see also *State v. Garcia*, 481 N.E.2d 148, 153-154 (Ind. App. 1st Dist. 1985) ("Since our roadblock program is new, time must elapse

to generate statistics upon which a comparison can be made."), aff'd, 500 N.E.2d 158 (Ind. 1986).

A court need not, of course, accept a wholly unsupportable claim that a program has deterrent impact, or will otherwise be effective in addressing an important social problem. But a court serves its function when it determines that there is plausible support for the State's conclusion that the measure furthers its stated goals. Thus, in *Skinner*, the Court relied on "the railroad industry's experience" and "common sense" in concluding that post-accident alcohol and drug testing would deter abuse by increasing the likelihood that abusers would be discovered. 109 S.Ct. at 1419. These same factors of experience and, above all, common sense,[10] compel the conclusion that state and local governments' use of sobriety checkpoints are significant elements in their overall programs to combat drunk driving.[11]

2. *The Michigan courts erred in demanding that the State demonstrate the unavailability of other less-intrusive alternatives.*

Aside from its unwarranted second-guessing of Michigan's decision that sobriety checkpoints would further the State's goals, the Michigan courts also faulted the program

---

[10] It is this common-sense attitude, and not any abundance of empirical evidence, that has driven this Court's recent approach to the exclusionary rule in its Fourth Amendment jurisprudence. See *Stone v. Powell*, 428 U.S. 465, 492 (1976) ("Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it.").

[11] Deference to the State's assessment is especially appropriate in cases where the State takes action pursuant to its authority to regulate the consumption of alcohol. This Court has held that the Twenty-first Amendment's unique grant of authority requires the courts to afford an "added presumption in favor of the validity" of state regulation of alcohol. *California v. LaRue*, 409 U.S. 109, 118-119 (1972); see also *City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981).

because, in the words of the trial court, "there exist alternative means available to the defendants in their efforts to curb drunk driving." Pet. App. 102a. This demand that the State prove the unavailability of other feasible means to advance its goals is wholly inconsistent with the approach this Court has adopted. The Court spoke to this precise issue last Term in *Skinner*:

> Respondents offer a list of "less drastic and equally effective means" of addressing the Government's concerns, including reliance on the private proscriptions already in force, and training supervisory personnel "to effectively detect employees who are impaired by drug or alcohol use without resort to such intrusive procedures as blood and urine tests." . . . We have repeatedly stated, however, that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). See also *Colorado v. Bertine*, 479 U.S. 367, 373-374 (1987). It is obvious that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers . . . ."

Skinner, 109 S. Ct. at 1419 n.9 (parallel citations omitted), quoting *Martinez-Fuerte*, 428 U.S. at 556-557 n.12. The Michigan courts' demanding search for less intrusive methods that might advance the State's interest is precisely the kind of inquiry that the Court so unequivocally condemned in *Skinner* and previous cases.

There is good reason for the Court's refusal to engage in aggressive scrutiny of a state or local government's claim that a neutral program, such as the checkpoints at issue here, effectively promotes important interests: the State has absolutely nothing to gain by using an ineffective measure. These programs are not at all similar to discretionary law enforcement mechanisms, such as the suspicionless stops in *Delaware v. Prouse*, 440 U.S. 648 (1979), which raise "grave danger that . . . unreviewable discretion [will] be abused by some officers in the field."

Martinez-Fuerte, 428 U.S. at 559. This same concern with controlling discretion necessitates a neutral determination of probable cause prior to a typical search, in order to ensure that society's passion for solving crime does not drive it to trample on an individual suspect's rights, especially when there is a risk that police discretion in such circumstances may "be sensitive to social station and other factors that should not bear on the decision." J. Ely, *Democracy and Distrust* 97 (1980). But the concern that the State may be undervaluing the rights of some segment of its population (such as youths or some racial or ethnic minority) is wholly absent in the case of a neutral program that subjects all citizens, rich and poor, powerful and powerless, to the same brief inconvenience of a sobriety checkpoint. Because they are accountable to their citizens, state and local governments are made to bear the full brunt of any economic and political costs associated with such programs. If they nonetheless decide to proceed with them, as so many have, there is absolutely no reason for courts to suspect that they are driven by anything but a good-faith effort to curb drunk driving. To borrow from one of the Court's equal protection decisions: "It should be recognized that the classification selected by Congress is not one which is directed 'against' any individual or category of persons, but rather it represents a policy choice in an experimental program made by that branch of Government vested with the power to make such choices." *Marshall v. United States*, 414 U.S. 417, 428 (1974).

Perversely, instead of affording some degree of deference to the State's conclusions about the efficacy of sobriety checkpoints, the trial court actually appeared to discount the value of the state officials' testimony. The court suggested that their testimony was somehow biased because the state officials had an "interest in the outcome of the litigation." Pet. App. 94a. This aggressive mistrust of a State's reasoned determinations is entirely misplaced in reviewing a program carefully crafted by the

State to cope with one of the major health and safety issues facing America today.

3. *There is more than ample evidence that sobriety checkpoints are effective elements in anti-drunk-driving programs.*

Scores of studies conducted by federal agencies and federal commissions,[12] state agencies, and state commissions[13] have concluded that sobriety checkpoints are important elements in the arsenal against drunk driving. Given this broad consensus, respondents have an exceedingly heavy burden to bear if they are to attack successfully the State's conclusion that sobriety checkpoints promote vital state interests. In assessing whether respondents have met that exceptional burden, this Court is, of course, not bound by any conclusions that the lower courts reached. See *Lockhart v. McCree*, 476 U.S. 162, 168-169 n.3 (1986) (discussing Court's role in evaluating "legislative facts," particularly when courts have split in their assessment of data). Whether sobriety checkpoints are a useful facet of state programs to deter drunk driving is an issue of legislative fact, not an issue about which a court can rule based on a battle of expert witnesses paraded before it. As the Fifth Circuit has written: "If

[12] See, *e.g.*, Lacey & Lucke, *Enforcement and Public Information Strategies for DWI General Deterrence: The Boise City, Idaho Experience: Final Report* 81 (DOT/NHTSA 1987) (in order to enhance general deterrence, "highly visible enforcement strategies such as checkpoints should be employed if at all possible"); Lacey, Stewart, Marchetti, Popkin, Murphy, Lucke & Jones, *Enforcement and Public Information Strategies for DWI General Deterrence: ARREST DRUNK DRIVING—The Clearwater and Largo, Florida Experience: Final Report* 66 (DOT/NHTSA 1986) (coordinated enforcement and public information program that included sobriety checkpoints significantly reduced alcohol-related and nighttime crashes); Voas, Rhodenizer & Lynn, *Evaluation of Charlottesville Checkpoint Operations: Final Report* 47-49 (DOT/NHTSA 1985) (Charlottesville checkpoint program found to be effective in increasing the perceived risk of arrest, reducing reported incidence of drinking and driving).

[13] See *supra* note 2.

the legislative decision is not binding at this stage, at least it carries great weight. Certainly it cannot be thrust aside by two experts and a judicial trier of fact." *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality opinion), cert. denied, 467 U.S. 1259 (1984).

When the Michigan Court of Appeals affirmed the trial court's ruling based on the "clearly erroneous" standard of review, it ignored the essential character of legislative facts such as these. Instead of deferring to the lower court's conclusions, and upholding them unless they were clearly erroneous, the court of appeals should have deferred to the State's conclusions, and upheld them unless they were clearly erroneous. The fact is, however, that no matter what standard of review is employed, Michigan's conclusion that sobriety checkpoints are effective stands up to inquiry.[14]

The basic goal of sobriety checkpoints is to increase public perception that drunk drivers will be caught, and thus, combined with other facets of the campaign against drunk driving, to deter people from drinking and driving. Those who have attacked checkpoint programs often have claimed that these goals can be equally well served through enhanced use of roving patrols, in which officers stop any driver whose erratic driving provides reasonable suspicion that he is intoxicated. The trial court in this case seemed to take this position, proclaiming that "conventional law enforcement methods, when utilized in conjunction with campaigns to increase the public awareness of the problem of drunk driving, were shown to be effective methods of curbing drunk driving." Pet. App. 98a. There are two basic reasons, however, why roving patrols do not, and

[14] In the improbable event that the Court were to find that there is insufficient evidence to sustain the Michigan program, or that some detail of the Michigan program is otherwise faulty, that decision would, of course, be limited to the Michigan checkpoint program and would not mean that sobriety checkpoints are generally impermissible.

cannot, provide the same deterrent impact as a program incorporating both roving patrols and sobriety checkpoints.

First, many drivers who are not fearful of being caught by roving patrols are in fact fearful of being detected by sobriety checkpoints. As a NHTSA study explained:

> Drivers may believe that they stand little chance of being detected if they drive after drinking too much. They may believe that the police will not notice them or that they can drive carefully enough not to attract suspicion if they are noticed. But roadblocks, or safety checkpoints, counter this belief because the potential of a drunk driver being detected is increased.

NHTSA, *The Use of Safety Checkpoints for DWI Enforcement* 2 (DOT HS 806-476, 1983). Various surveys of motorists,[15] including one conducted by the Michigan Task Force, confirm this observation. See *supra* pages 6-7 (quoting results of Michigan survey).

Second, and somewhat related, sobriety checkpoints enable police to arrest some drivers who would not ordinarily be detected by a roving patrol. Roving patrols work if, and only if, at the precise moment that a driver is being observed, he drives his car in a way that creates a reasonable suspicion justifying a stop.[16] But "the ability

---

[15] See Dickman, *Sobriety Checkpoints for DWI Enforcement: A Review of Current Research* 2 (DOT/NHTSA 1987); Lacey & Lucke, *Enforcement and Public Information Strategies for DWI General Deterrence: The Boise City, Idaho Experience: Final Report* 71, 81 (DOT/NHTSA 1987); Lynn, *An Evaluation of Thirteen Local Selective Enforcement Projects Designed to Reduce Drunken Driving in Virginia* 61 (Virginia Highway & Transportation Research Council 1985); Hingson, *1987 Massachusetts/New Hampshire Road Block Surveys* (Massachusetts Governor's Highway Safety Bureau 1987).

[16] See Vingilis & Salutin, *A Prevention Programme for Drinking Driving*, 12 Accid. Anal. & Prev. 267, 268 (1980) ("other drinking-drivers that may be potentially just as dangerous, may go undetected because they do not fit the classical pattern"); 4 W. LaFave, *Search and Seizure* 72-73 (2d ed. 1987) (given difficulty of detecting drug drivers through traditional means, "[i]t is by no means surprising . . . that it has been reliably estimated that only one of every 2,000 drinking drivers is apprehended").

of a drunk driver to avoid erratic movements along a roadway does not mean he will be able to respond to an emergency where prompt reflexes may be of great importance." *People v. Bartley*, 109 Ill.2d at 287, 486 N.E.2d at 886. In *Skinner*, the Court recognized that impaired rail employees "can cause great human loss before any signs of impairment become noticeable to supervisors or others." 109 S. Ct. at 1419. If that is true with respect to railway employees who are in continuous contact with others, it is certainly true with respect to drivers for whom the only possible chance of casual detection is the hope that an officer will observe the motorist during the precise moment of erratic driving. The enhanced possibility of detecting alcohol-impaired drivers at checkpoints does more than further the State's goal of detecting drunk driving; it also deters those who thought they could evade detection.

Moreover, there is evidence that sobriety checkpoints are considerably more effective than roving patrols in detecting drivers with a blood alcohol content ("BAC") under .15[17] These data further confirm the importance

---

[17] *Commonwealth v. Tarbert*, 517 Pa. 277, 292, 535 A.2d 1035, 1042 (1987) ("'While those drunk drivers arrested by roving patrols average a .169 to .20 blood alcohol content (BAC) level, drunk drivers arrested at Delaware sobriety checkpoints averaged a .14 BAC level.'") (quoting *Commonwealth v. Leninsky*, 360 Pa. Super. 49, 60-61, 519 A.2d 984, 990-991 (1986)); *Lowe v. Commonwealth*, 230 Va. at 352, 337 S.E.2d at 277 (drunk drivers at checkpoints in use "were being detected at lower blood alcohol content levels than had previously been identified using routine patrol methods"). See also Voas, Rhodenizer & Lynn, *Evaluation of Charlottesville Checkpoint Operations: Final Report* 15 (DOT/NHTSA 1985) (checkpoints are much more effective in detecting drivers with BACs of .15 or lower and moderately more effective at detecting drivers with BACs between .15 and .19); Harris, Dick, Casey & Jarosz, *The Visual Detection of Driving While Intoxicated* 26-28 (DOT/NHTSA 1980) (evidence indicating that training in detecting visual cues of drunken driving caused statistically insig-

of sobriety checkpoints in facilitating arrests of, and in deterring, drivers with levels between the legal limit [18] and the levels at which drunk drivers can be readily detected through their erratic driving. There is, therefore, a clear and distinct category of legally intoxicated and frighteningly dangerous drivers [19] who are difficult, if not impossible, to detect through the "reasonable suspicion" standard by which roving patrols operate. Cf. *National Treasury Employees Union*, 109 S. Ct. at 1392 (traditional standards are of little help when Government seeks to "detect violations that rarely generate articulable grounds for searching any particular place or person"); *Skinner*, 109 S. Ct. at 1420 (requiring "particularized suspicion of drug or alcohol use would seriously impede" government's objectives); *Martinez-Fuerte*, 428 U.S. at 557 (discussing impracticality of trying to control influx of illegal aliens through roving patrols); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967) ("doubtful that any other canvassing technique would achieve acceptable results").

---

nificant amount of change in average BAC of persons arrested; mean remained at approximately .164).

[18] As of 1988, 41 States considered BAC levels of .10 or above illegal per se. Two States, Oregon and Utah, consider BAC levels of .08 or above illegal per se. See NHTSA, *Digest of State Alcohol-Highway Safety Related Legislation* (6th ed. 1988).

[19] See Moskowitz & Robinson, *Effects of Low Doses of Alcohol on Driving-Related Skills: A Review of the Evidence* 67 (DOT/NHTSA 1988) (discussing strong evidence that driving skills are impaired at BAC levels far below .15); Legislative Commission on Expenditure Review—State of New York, *Drinking Driver Program* 34 (1979) (describing effects of BACs in the .10 to .14 range as causing "difficulty in performing many gross motor tasks" and "definite impairment of mental faculties, memories, and judgment"). One study reports that drivers in this range are especially dangerous because they "do not appear to be aware of the increased risk brought on by inebriation and do not exhibit compensatory behavior." 1 Allen, Hogge, Schwartz & Stein, *The Effects of Alcohol on the Driver's Decision-Making Behavior: Final Report* 139-140 (1978).

Given these phenomena, as well as the obvious advantage that the high visibility of sobriety checkpoints affords in furthering public education and deterrence, it has surely been reasonable for the many States, such as Michigan, which have implemented sobriety checkpoint programs, to conclude that checkpoints can be important aspects of their overall programs designed to detect and deter drunk drivers. The Michigan courts ignored this wealth of information, however, choosing to focus exclusively on the number of arrests that checkpoints have facilitated.[20] In so doing, the Michigan courts fell into the classic trap of trying to evaluate a deterrent measure by looking at how many offenders are actually caught.[21] This Court explained in *National Treasury Employees Union* that "[w]hen the Government's interest lies in deterring highly hazardous conduct, a low incidence of

---

[20] Michigan's primary claim is that sobriety checkpoints can lead to *long-term* general deterrence, a claim that cannot be disproved by focusing on short-term arrest or fatality rates. The trial court's dissection of the Maryland data, compiled over a three-month period, is, therefore, quite irrelevant. Pet. App. 84a-92a.

[21] To the extent that ratios are important, the number of drunk drivers arrested per drivers stopped at sobriety checkpoints compares quite favorably with the ratio of detection achieved in other programs that the Court has approved. During a sample period, the alien checkpoint in *Martinez-Fuerte*, for example, checked 146,000 vehicles, finding illegal aliens in 171 of them, or approximately 1/10 of 1%. See *Martinez-Fuerte*, 428 U.S. at 554. Likewise, in *National Treasury Employees Union*, the Court proceeded on the assumption that only 5 out of 3600 tests, again approximately 1/10 of 1%, had uncovered illegal drug use. 109 S.Ct. at 1394. The ratios produced by checkpoint programs have been considerably larger. During the one night of testing in Michigan, for example, 2 out of 126, or 1.6%, of the drivers who passed the checkpoints were arrested.

Statistics reported from other States indicate that this figure is only a bit higher than the typical experience (see Pet. App. 80a-83a), although one State reported a short-term arrest rate of 7%. See *State v. Garcia*, 481 N.E.2d at 154. These variations in results confirm the need for localized determination about whether sobriety checkpoints will prove effective.

such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." 109 S. Ct. at 1396; see also *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). As Justice Simon wrote for the Illinois Supreme Court: "Admittedly the possibility that a driver will face a roadblock on his way home will not discourage all drunk driving, but on the basis of common sense alone one must conclude that many persons aware of that prospect will have second thoughts about driving." *People v. Bartley*, 109 Ill. 2d at 287, 486 N.E.2d at 886.

C. Structured Sobriety Checkpoints Involve A Minimal Degree Of Intrusion And Interference.

Although structured checkpoints undoubtedly qualify as "seizures" under the Fourth Amendment, the Court has recognized that their "intrusion on Fourth Amendment interests is quite limited." *Martinez-Fuerte*, 428 U.S. at 557. Not only do individuals have diminished expectations of privacy in their automobiles, but these checkpoints involve "only a brief detention of travelers during which" the most that is required of the driver "'is a response to a brief question or two.'" *Id.* at 558 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)). At sobriety checkpoints, just as at the alien checkpoints upheld in *Martinez-Fuerte*, "[n]either the vehicle nor its occupants are searched." 428 U.S. at 558.

Some of these same characterizations apply to suspicionless stops by roving patrols as well. But two key factors reduce the Fourth Amendment concern with sobriety checkpoints and distinguish them from roving patrols such as those struck down in *Brignoni-Ponce* and *Delaware v. Prouse*, 440 U.S. 648 (1979): first, checkpoints do not afford individual officers discretion to decide which vehicles to stop; and, second, checkpoints generate far less concern and fright on the part of law-abiding drivers. Analysis of these two factors reveals that the degree of intrusion caused by sobriety checkpoints such as those contemplated by Michigan is virtually

identical to that involved in the checkpoint program that this Court upheld in *Martinez-Fuerte*.

1. *The sobriety checkpoints at issue here do not leave officers any discretion in determining which cars to stop.*

One of the primary goals of the Fourth Amendment is to limit the "unconstrained exercise of discretion" by government officials in determining whether a particular individual ought to be questioned or searched. *Delaware v. Prouse*, 440 U.S. at 663. When officers have unfettered authority to pull over motorists whom they "have a hunch" are driving suspiciously, the risks of abuse are great. Hence, the Court has announced that the "Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of that particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. at 51. The sobriety checkpoints at issue here clearly qualify under the second of these formulations.

The guidelines that define Michigan's sobriety checkpoint program effectively limit police discretion at every stage of the process. Sites for the checkpoints are selected with reference to the accident history of the locations as well as a variety of safety-related factors. Pet. App. 147a-150a. Uniformed officers working the site are given specific instruction on the operation of the checkpoint, including the precise "procedure to be followed in approaching a vehicle, the initial contact with its driver, and what to do in specific situations." *Id.* at 151a. To ensure compliance with these rules, the guidelines require that "[a] state police commissioned officer of Lieutenant rank or higher shall be the officer in charge at the sobriety checkpoint location." *Id.* at 157a. Most critically, the guidelines afford the officers absolutely no discretion in determining which cars to stop. While a checkpoint is in operation, "[a]ll traffic passing through the checkpoint

site shall be stopped" *Id.* at 154a.[22] Indeed, in their attempt to eliminate all police discretion in operating the checkpoints, Michigan's guidelines go so far as to prescribe a script for the officer to follow: "A uniformed police officer will approach the motorist and state, 'I am Trooper (Officer) _____ of the Michigan State Police (local police department). You have entered a sobriety checkpoint set up to identify intoxicated drivers.'" *Id.* at 162a. If there is no evidence of intoxication, the officer is then directed to "hand the driver a brochure explaining the program, as well as a mail-back survey card, and direct the motorist on his/her way." *Id.* at 155a. Only in the event that the officer observes "articulable indications of intoxication" is the driver directed to a secondary check area for further investigation. *Ibid.*

This rigorous control of official discretion is exactly what this Court and dozens of state courts[23] have looked for in assessing whether a program constitutes a significant instrusion on Fourth Amendment interests. In *Delaware v. Prouse*, the Court struck down a roving patrol scheme under which an officer, having no reason to suspect that the driver was violating any law, and "not acting pursuant to any standards, guidelines, or procedures," decided to pull the driver over to check his driver's license and registration. 440 U.S. at 650. In condemning the seizure, the Court pointed out that either "an appropriate basis of suspicion directed at a particular automobile" or "some other substantial and

[22] In the event that "traffic congestion or other circumstances arise that warrant the discontinuing of the operation" the supervising officer "may close down the operation for any length of time necessary." Pet. App. 158a. This authority raises none of the risks associated with giving police the discretion to choose which drivers should be stopped.

[23] Most of the state courts to consider the constitutionality of sobriety checkpoints have upheld them (see Pet. App. 165a-168a (listing 22 states that have upheld checkpoints)), virtually always focusing on the existence of guidelines that eliminated police discretion in deciding whom to stop.

objective standard or rule to govern the exercise of discretion" was required in order to eliminate the dangers associated with the "unbridled discretion of law enforcement officials." *Id.* at 661. Consistent with this rule, the Court invited the States to develop programs that would serve their law enforcement needs while still preserving the Fourth Amendment value of limiting police discretion. The Court declared that it did not intend to "preclude the State of Delaware or other States from developing methods for spot checks that involve less instrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663; see also *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). There is no doubt that Michigan, and the great majority of other States that have devised sobriety checkpoints since *Prouse*, have complied with this direction.

In at least one sense, then, suspicionless stops at sobriety checkpoints are less constitutionally problematic than the alternative of stops by roving patrols based on particularized suspicion. Although this Court has upheld stops by roving patrols based on reasonable suspicion, there always remains the possibility that some officers will decide whom to stop based on arbitrary or discriminatory motives. Neutral checkpoints significantly minimize if not eliminate this risk, by subjecting all drivers to brief stops, and requiring officers to refer all drivers whom they suspect to a secondary checkpoint. The presence of supervisory officials at the scene of the checkpoint serves to ensure that these guidelines will be followed. It is the risk of abused discretion that is at the core of the Fourth Amendment; and although stops on particularized suspicion are obviously permissible, the Court should not reject a State's decision to adopt an alternative plan, such as sobriety checkpoints, that all but eliminates the risks of abused discretion.

2. *Sobriety checkpoints result in only minimal objective and subjective intrusion into Fourth Amendment interests.*

The second factor that the Court has deemed critical in assessing routine stops for inquiry is the extent of the actual interference and intrusion that motorists experience. Whether the focus is on the objective element of the stop or the subjective issues of fear and fright that some seizures can cause, sobriety checkpoints cause only minimal intrusions, even less than those associated with the routine searches and seizures that this Court has upheld.

On the objective level, the trial court found that the "average length of a stop when a person was confronted by a police officer at a checkpoint was approximately 30 seconds." Pet. App. 103a. The court also noted that the "intensity of the investigation by the police during this 30 second time period was not great, inasmuch as the police were directed only to observe the driver for signs of intoxication." *Id.* at 104a. In light of these findings, the trial court concluded "that the objective nature of the intrusion was minimal." *Ibid.*

This conclusion is indisputable, especially when the intrusiveness of sobriety checkpoints is compared to the intrusions that the Court has deemed minor or brief in other cases. In *Martinez-Fuerte*, for example, the Court described the "brief" detention involved when " 'all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.' " 428 U.S. at 558 (quoting *Brignoni-Ponce*, 422 U.S. at 880). Even though some drivers were being diverted for average periods of three to five minutes and their papers were examined, the Court considered the intrusion sufficiently slight to minimize any Fourth Amendment concerns. *Martinez-Fuerte*, 428 U.S. at 547, 563.[24] The unin-

[24] The average of three to five minutes was for those cars diverted to secondary checkpoint areas. But because the referrals to secondary checkpoints in *Martinez-Fuerte* were made in the absence of any particularized suspicion, the Court had to address whether this amount of time constituted an undue intrusion for a routine questioning program. The sobriety checkpoints at issue here are very different; referrals to secondary areas are made only on the basis of articulable and reasonable suspicion, the same quantum of suspicion that would justify a stop by a roving patrol officer under *Delaware v. Prouse*, 440 U.S. at 663.

trusiveness of sobriety checkpoints is even more striking when compared to the routine blood, urine, and breath testing that the Court sustained last Term in *National Treasury Employees Union* and *Skinner*.

The subjective nature of the intrusion caused by sobriety checkpoints is also quite minimal, and compares favorably with the routine checking programs that this Court has upheld. In *Martinez-Fuerte*, the Court focused on the "subjective intrusion—the generating of concern or even fright on the part of lawful travelers" in explaining how checkpoints are constitutionally different from roving patrols, such as those that the Court struck down in *Brignoni-Ponce*. The Court declared that the

> "circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion."

Martinez-Fuerte, 428 U.S. at 558 (quoting *United States v. Ortiz*, 422 U.S. 891, 894-895 (1975)).

The sobriety checkpoint program at issue here provides all of the safeguards against fear and fright that the *Martinez-Fuerte* program did. Beginning approximately a quarter of a mile before the checkpoint, official signs are posted to notify motorists that they are entering a sobriety checkpoint area. Pet. App. 108a. The Michigan guidelines further require that "[w]arning signs, flares, cones, and/or emergency lighting equipment will be utilized and

conspicuously displayed to provide adequate notice." *Id.* at 153a. At the checkpoints themselves, the presence of a significant number of officers, including command personnel, an approach safety officer, observation officers, data collection officer, lane safety officer, checkpoint contact officer, and, if necessary, support personnel (*id.* at 157a-164a), make it apparent to any motorist that there is an official police activity in process, and that no single motorist is being singled out for suspicion. These indicia of authority and neutrality eliminate the fear and anxiety that might accompany being pulled over by a lone marked or unmarked police vehicle.

The trial court nonetheless concluded that Michigan's sobriety checkpoint program could cause significant fear and fright among motorists because, unlike the permanent checkpoint upheld in *Martinez-Fuerte*, the sobriety checkpoint would move from night to night, and motorists would be unable to anticipate where the checkpoint is located. There is no constitutional substance to this distinction between temporary and permanent checkpoints. As the New York Court of Appeal explained in unanimously upholding its State's sobriety checkpoint program:

> The subjective effect upon a vehicle driver approaching a roadblock is unrelated to whether it is permanent or was established but a few minutes before the driver approached it; in either instance his or her observation of it will be measured in minutes if not seconds. The likelihood of there being the kind of fright or annoyance that invalidates a random stop made by a roving patrol is obviated in the case of a temporary checkpoint by the visible signs of authority which the checkpoint entails—signs announcing the purpose, lighting, and identifiable police vehicles and the observable fact that there is a uniform system for stopping cars.

People v. Scott, 63 N.Y. 2d at 527, 483 N.Y.S.2d at 653, 473 N.E.2d at 5; see also *United States v. Hernandez*, 739 F.2d 484, 488 (9th Cir.) (no constitutional difference between temporary and permanent checkpoints),

cert. denied, 469 U.S. 1021 (1984); *Little v. State*, 300 Md. at 507-508, 479 A.2d at 914 (temporary nature of checkpoints does not make them analogous to roving patrols). The factors that minimized fear and fright in *Martinez-Fuerte* were the "public and relatively routine nature" of the stops, and these identical factors minimize fear and fright associated with sobriety checkpoints.[25] Indeed, a number of studies have documented the essentially favorable reaction among motorists who have been subject to brief sobriety checkpoints.[26]

In assessing the slight intrusion associated with sobriety checkpoints, the Court should consider the much greater intrusion that roving patrols cause when an officer pulls over a driver whom he suspects is intoxicated. If this Court were to invalidate sobriety checkpoints, many state and local governments would be forced to respond by stepping up the use of roving patrols. And because reasonable suspicion is far from certainty, any increase in the use of roving patrols will necessarily also result in an increase of false positive stops—more and more drivers will be subjected to the fear, fright, and embarrassment of being pulled over by roving patrols who mistakenly believed that they observed erratic driving indicative of drunkenness. When this intrusion is compared with the 25- or 30-second routine stops involved here, it becomes

---

[25] The trial court identified numerous other distinctions between temporary and permanent roadblocks, but none of these rises to constitutional significance. For example, the fact that drivers may be better able to evade permanent checkpoints should certainly not weigh in favor of their legitimacy.

[26] See Michigan Drunk Driving Task Force, *Final Report* 13 (1985); NHTSA, *The Use of Safety Checkpoints for DWI Enforcement* 15 (DOT HS 806-476, 1983); Soble, *Clearing the Roadblocks to Sobriety Checkpoints*, 21 Mich. J. Law. Ref. 489, 490 n.6 (1988). See also *Martinez-Fuerte*, 428 U.S. at 561 n.14 ("practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use"). This Court has suggested that widespread public acceptance of a neutral program such as this is a significant factor in assessing its reasonableness. See *Camara v. Municipal Court*, 387 U.S. at 537.

clear that sobriety checkpoints are not only an effective way of detecting and deterring drunk driving but that, on balance, they may well be the least constitutionally problematic way of detecting and deterring drunk driving.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

ANDREW L. FREY
ERIKA Z. JONES
LAWRENCE C. MARSHALL
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20036
(202) 463-2000
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

November 16, 1989

Supreme Court, U.S.
FILED
NOV 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

COPY

No. 88-1897

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R.T. DAVIS, Director of the Michigan Dept. of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW AND JACK WELBORN,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE STATES OF CALIFORNIA, FLORIDA, NORTH CAROLINA AND THE COMMONWEALTH OF MASSACHUSETTS

JOHN K. VAN DE KAMP
Attorney General
RICHARD B. IGLEHART
Chief Assistant Attorney General
JOHN H. SUGIYAMA
Senior Assistant Attorney General
MORRIS BEATUS
Supervising Deputy Attorney General
RONALD E. NIVER
Deputy Attorney General

350 McAllister Street, Room 6000
San Francisco, California 94102
Telephone: (415) 557-2653

ATTORNEY GENERALS JOINING IN THIS BRIEF

ROBERT A. BUTTERWORTH
Attorney General of Florida
State Capitol
Tallahassee, Florida 32301
(904) 488-9935

LACY H. THORNBURG
Attorney General of North Carolina
Department of Justice
Two East Morgan Street
Raleigh, N.C. 27602
(919) 733-3377

JAMES M. SHANNON
Attorney General of Massachusetts
One Ashburton Place - 20th Floor
Boston, Mass. 02108
(617) 727-2200

QUESTION PRESENTED

Does the use of sobriety checkpoints by the State of Michigan violate the Fourth Amendment because the brevity of their use as a deterrent technique may have limited empirical proof of their effectiveness?

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	
THE USE OF SOBRIETY CHECKPOINTS TO PROMOTE HIGHWAY SAFETY IS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT	7
CONCLUSION	51

TABLE OF AUTHORITIES

	Page
Bell v. *Wolfish* 441 U.S. 520 (1979)	10
Brown v. *Texas* 443 U.S. 47 (1979)	11
Burg v. *Municipal Court* 35 Cal.3d 257, 673 P.2d 732 (1983)	24
Cady v. *Dombrowski* 413 U.S. 441 (1973)	18
California v. *Carney* 471 U.S. 386 (1985)	18
Camara v. *Municipal Court* 387 U.S. 523 (1967)	10
Cardwell v. Lewis 417 U.S. 583 (1974)	18
City of Las Cruces v. *Betancourt* 735 P.2d 1161 (N.M. 1987)	42
City of Seattle v. *Mesiani* 110 Wash.2d 454, 755 P.2d 775 (1988)	44
Coffman v. *State* 26 Ark.App. 45, 759 S.W.2d 573 (1988)	41
Colonnade Corp. v. *United States* 397 U.S. 72 (1970)	16
Colorado v. *Bertine* 479 U.S. 367 (1987)	12
Commonwealth v. *Tarbert* 517 Pa. 277 (1987)	42
Commonwealth v. *Trumble* 396 Mass. 81, 483 N.E.2d 1102 (1985)	41
Delaware v. *Prouse* 440 U.S. 648 (1979)	8

TABLE OF AUTHORITIES

	Page
Donovan v. *Dewey* 452 U.S. 594 (1981)	16
Griffin v. *Wisconsin* 483 U.S. 868 (1987)	9
Illinois v. *Lafayette* 462 U.S. 640 (1983)	32
Ingersoll v. *Palmer* 43 Cal.3d 1321, 743 P.2d 1299 (1987)	3
INS v. *Delgado* 466 U.S. 210 (1984)	8
Kinslow v. *Commonwealth* 660 S.W.2d 677 (Ky.App. 1983), 460 U.S. 1005 (1984)	41
Little v. *State* 300 Md. 485, 479 A.2d 903 (1984)	41
Lowe v. *Commonwealth* 230 Va. 346, 475 U.S. 1084 (1985)	42
Mapp v. *Ohio* 367 U.S. 643 (1961)	40
Marshall v. *Barlow's, Inc.* 436 U.S. 307 (1978)	16
Michigan v. *Chesternut* ___ U.S. ___, 108 S.Ct. 1975 (1988)	8
Miller v. *State* 373 So.2d 1004 (Miss. 1979)	42
National Treasury Employees Union v. *Von Raab* ___ U.S. ___, 109 S.Ct. 1384 (1989)	9
Nelson v. *Lane County* 304 Or. 97, 743 P.2d 692 (1987)	42

TABLE OF AUTHORITIES

	Page
New Jersey v. *T.L.O.* 469 U.S. 325 (1985)	9
New York v. *Burger* 482 U.S. 691 (1987)	10
New York v. *Class* 475 U.S. 106 (1986)	18
O'Connor v. *Ortega* 480 U.S. 709 (1987)	10
Pennsylvania v. *Mimms* 434 U.S. 106 (1977)	29
People v. *Bartley* 109 Ill.2d 273, 486 N.E.2d 880 (1985), 475 U.S. 1068 (1986)	39
People v. *Scott* 63 N.Y.2d 518, 473 N.E.2d 1 (1984)	28
Rakas v. *Illinois* 439 U.S. 128 (1978)	18
See v. *City of Seattle* 387 U.S. 541 (1967)	16
Segura v. *United States* 468 U.S. 796 (1984)	28
Skinner v. *Railway Labor Executives Ass'n* ___ U.S. ___, 109 S.Ct. 1402 (1989)	9
South Dakota v. *Neville* 459 U.S. 553 (1983)	24
South Dakota v. *Opperman* 428 U.S. 364 (1976)	18
State ex rel. Ekstrom v. *Justice Court* 136 Ariz 1, 668 P.2d 992 (1983)	39

TABLE OF AUTHORITIES

	Page
State v. *Abelson* 485 So. 861 (Fla.App. 1986)	41
State v. *Alexander* 22 Ohio Misc.2d 34, 489 N.E.2d 1093 (1985)	42
State v. *Church* 538 So.2d 993 (La. 1989)	44
State v. *Crom* 222 Neb. 273, 383 N.W.2d (1986)	42
State v. *Deskins* 234 Kan. 102, 673 P.2d 1174 (1983)	41
State v. *Garcia* 500 N.E.2d 158 (Ind. 1986), 481 U.S. 1014 (1987)	41
State v. *Golden* 171 Ga.App. 27, 318 S.E.2d 693 (1984)	41
State v. *Jones* 483 So.2d 433 (Fla. 1986)	41
State v. *Kirk* 202 N.J.Super. 28, 493 A.2d 1171 (App.Div. 1985)	42
State v. *Koppel* 127 N.H. 286 (1985)	44
State v. *Leighton* 551 A.2d 116 (Me. 1988)	41
State v. *Martin* 145 Vt. 562, 496 A.2d 442 (1985)	42
State v. *Olgaard* 248 N.W.2d 382 (S.D. 1976)	44
State v. *Riley* 377 N.W.2d 242 (Ia.App. 1985)	41

TABLE OF AUTHORITIES

	Page
State v. *Smith* 674 P.2d 562 (Okla.Ct.Crim.App. 1984)	45
State v. *Superior Court* 143 Ariz. 45, 691 P.2d 1073 (1984)	40
Terry v. Ohio 392 U.S. 1 (1968)	10
Texas v. *Brown* 460 U.S. 730 (1983)	29
United States v. *Biswell* 406 U.S. 311 (1972)	16
United States v. *Brignoni-Ponce* 422 U.S. 873 (1975)	8
United States v. *Chackwick* 433 U.S. 1 (1977)	20
United States v. *Jacobsen* 466 U.S. 109 (1984)	28
United States v. *Karo* 468 U.S. 706 (1984)	9
United States v. *Knotts* 460 U.S. 276 (1983)	50
United States v. *Leon* 468 U.S. 897 (1984)	31
United States v. *Martinez-Fuerte* 428 U.S. 543 (1976)	8
United States v. *Ortiz* 422 U.S. 891 (1975)	26
United States v. *Place* 462 U.S. 696 (1983)	12

TABLE OF AUTHORITIES

	Page
United States v. *United States District Court* 407 U.S. 297 (1972)	13
United States v. *Villamonte-Marquez* 462 U.S. 579 (1983)	10
Webb v. *State* 739 S.W.2d 802 (Tex.Cr.App. 1987)	42
Wolf v. *Colorado* 338 U.S. 25 (1949)	40
Wyman v. *James* 400 U.S. 309 (1971)	16

STATUTES AND OTHER AUTHORITIES

	Page
4 La Fave, Search and Seizure: A Treatise on the Fourth Amendment (2d Ed. 1987)	21

No. 88-1897

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE
and COL. R.T. DAVIS, Director of the
Michigan Dept. of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW AND JACK WELBORN,

Respondents.

ON WRIT OF CERTIORARI TO THE
MICHIGAN COURT OF APPEALS

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE STATES OF CALIFORNIA, FLORIDA, NORTH CAROLINA AND THE COMMONWEALTH OF MASSACHUSETTS

INTEREST OF AMICI CURIAE

Each year tens of thousands of people die on our nation's roads. About one-half of them have been killed by drunk drivers. It is difficult to identify and apprehend

an intoxicated driver before he injures or kills. Reliable estimates show that only one of 2000 drunk drivers is actually apprehended, often as a result of an accident or injury which he has caused. Because of the growth of this menace and the ineffectiveness of conventional law enforcement techniques in combatting it, over one-half of the States, California among them, have addressed the problem by using sobriety checkpoints. Typically, policy-making officials of a law enforcement agency devise a comprehensive plan identifying the dates and locations for a checkpoint. The plan also provides for procedures to implement the program, including: the number of officers, including supervisory personnel; the percentage of vehicles to be stopped; the length of the detention; the questions to be asked of the motorist; the lighting and safety features of the checkpoint; and the extent of the advance

publicity which identifies the location of the checkpoints. The purposes of these programs are to apprehend, deter, and educate. The California Supreme Court has upheld the constitutionality of sobriety checkpoints in the nation's largest state in terms of population and motor vehicles. *Ingersoll v. Palmer*, 43 Cal.3d 1321, 743 P.2d 1299 (1987). Empirical evidence in California indicates that a checkpoint, carefully designed and implemented to minimize the intrusion into the privacy of the motorists, effectively deters drunk driving. Our interest in using this life-saving procedure brings the People of the States of California, Florida, North Carolina and the Commonwealth of Massachusetts before this Court as Amici Curiae.

SUMMARY OF ARGUMENT

Ordinarily a search or seizure is invalid unless supported by a warrant issued upon probable cause. Those requirements yield when special needs, beyond the need for law enforcement, make the warrant and probable cause requirement impracticable. When the State demonstrates a valid noncriminal purpose, the validity of the search is determined by balancing the need to search against the privacy invasion which the search entails. The warrant requirement is inapplicable if the affected activity is heavily regulated and the requirement of a warrant thwarts the purpose of the search. Individualized suspicion is not required if it, too, defeats the reason for the search.

The State of Michigan has a compelling noncriminal need to use sobriety checkpoints: the safety of its

motorists. The intrusion is almost trivial: a 30-second detention which involves no search of the car or its occupants. The checkpoint program is implemented with predetermined criteria that upper-echelon law enforcement personnel have drafted. Consequently, the discretion vested in the in-field officers is minimal, a factor which correspondingly reduces any intrusion.

A warrant is unnecessary to justify the checkpoint program because driving is so heavily regulated an activity that motorists enjoy a reduced expectation of privacy. A warrant requirement does not serve the traditional purposes advanced for its applicability because the statutory or regulatory authorization for checkpoints both advises the motorists of the reason for the stop and limits the field officers' discretion in conducting the detention.

Requiring either probable cause or individualized suspicion frustrates the purpose of the checkpoint program. Application of these requirements results in the detection of only one drunk driver for every 2000 who are on the road. The safety of motorists requires more effective deterrence and, consequently, the dispensation with individualized suspicion at the checkpoints.

Finally, California's experience with sobriety checkpoints in the past five years furnishes unmistakable evidence of their effectiveness. If this Court accepts that evidence, it must then determine whether a human life is worth 30 seconds of a motorist's time. We earnestly submit that the answer is "yes" and the sobriety checkpoints deserves this Court's constitutional imprimatur.

ARGUMENT

THE USE OF SOBRIETY CHECKPOINTS TO PROMOTE HIGHWAY SAFETY IS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT.

The State of Michigan contends that its use of sobriety checkpoints to deter and identify drunk drivers is reasonable under the Fourth Amendment. *Amici curiae* emphatically support that position. We argue that the safety of highway motorists, thousands of whom are slaughtered each year by drunk drivers, justifies the minimal intrusion of a less than 30-second delay at a checkpoint. We further contend that it is reasonable to believe that the program is effective, but that its constitutionality does not depend upon proof that it is the most effective way to combat the menace of the drunk driver. Finally, we argue that it is not constitutionally necessary to obtain a warrant to implement

a sobriety checkpoint. For these reasons, we submit that that the Michigan sobriety checkpoint program does not offend the Fourth Amendment.

-A-

We begin by acknowledging that the detention of a motorist by law enforcement personnel at a checkpoint, even for a few seconds, is a seizure within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *cf. Michigan v. Chesternut*, ___ U.S. ___, 108 S.Ct. 1975, 1979 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984). The issue here is whether that seizure is reasonable within the meaning of the Fourth Amendment.

This Court's decisions teach that a search (or, as here, a seizure) must be supported by a warrant issued upon

probable cause. *See, e.g., National Treasury Employees Union v. Von Raab*, ___ U.S. ___, 109 S.Ct. 1384, 1390 (1989); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *United States v. Karo*, 468 U.S. 706, 717 (1984). But the requirements of probable cause and the issuance of a warrant may both yield when "'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Skinner v. Railway Labor Executives Ass'n*, ___ U.S. ___, 109 S.Ct. 1402, 1414 (1989), quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackman, J., concurring); *accord, Griffin v. Wisconsin, supra*, 483 U.S. at p. 873. When confronted with such "special needs," this Court has dispensed with both probable cause and the warrant requirement. *See, e.g., Skinner v. Railway Labor Executives Ass'n, supra*; *National Treasury Employees Union v. Von Raab, supra*;

Griffin v. Wisconsin, supra; *New York v. Burger,* 482 U.S. 691 (1987); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New Jersey v. T.L.O., supra*; *Bell v. Wolfish*, 441 U.S. 520 (1979). This Court then determines the reasonableness of the search or seizure by balancing the legitimate governmental interests that the search or seizure promotes against the nature and extent of the intrusion into personal privacy that the search or seizure entails. *Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1414; *New Jersey v. T.L.O., supra*, 469 U.S. at p. 337; *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse, supra*, 440 U.S. at p. 654; *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce, supra*, 422 U.S. at p. 878; *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967).

This balancing process requires an assessment of the extent to which the challenged governmental conduct advances that stated public interest (*Brown v. Texas*, 443 U.S. 47, 50-51 [1979]; *United States v. Martinez-Fuerte, supra*, 428 U.S. at p. 562; *United States v. Brignoni-Ponce, supra*, 422 U.S. at pp. 878-883), and the degree to which a person's reasonable expectation of privacy is subject to arbitrary invasions solely at the unfettered discretion of officers in the field. *See Delaware v. Prouse, supra*, 440 U.S. at pp. 654-655; *United States v. Brignoni-Ponce, supra*, 422 U.S. at p. 882. The less discretion exercised by the officer, the less government intrudes into the rights of the citizens. "To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure

must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas, supra*, 443 U.S. at p. 51 (emphasis added); *cf. Colorado v. Bertine*, 479 U.S. 367 (1987).

-B-

This Court's decisions place the burden upon the government to establish the existence of special needs which outweigh the search warrant and probable cause requirements. The need to enforce a penal statute generally is not considered sufficient to justify dispensing with those requirements. Thus, in most criminal cases, this Court "strike[s] the balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment." *Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1402; *United States v. Place*, 462 U.S.

696, 701 & n.2 (1983); *United States v. United States District Court*, 407 U.S. 297, 315 (1972).

Sobriety checkpoints are intended to do far more than apprehend the intoxicated drivers of motor vehicles who happen to be committing a public offense. One of the stated goals of the Michigan sobriety checkpoint program is to "deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents." App. to Pet. for Cert. 146a. A second objective is to "assure the safety of the general public as well as law enforcement officers involved." *Id.* at 147a. Thus, as is true of the California sobriety checkpoint program (*Ingersoll v. Palmer*, 43 Cal.3d 1321, 743 P.2d 1299 [1987]),

"the sobriety checkpoint here was operated not for the primary purpose of discovering or preserving evidence of crime or arresting lawbreakers, but primarily for the regulatory purpose of keeping intoxicated drivers off the

highways to the end of enhancing public safety. Analytically it is much the same as an immigration checkpoint or a checkpoint to inspect for the safety of equipment or compliance with agricultural regulations. The threat to public safety is at least as great and the intrusion into Fourth Amendment interests is no greater here than in those other regulatory checkpoint inspections which have invariably been held constitutionally permissible." *Id.* at 1335, 743 P.2d at p. 1313.

The operation of a motor vehicle while intoxicated is a public offense, but that does not alter the administrative character of the checkpoint program. "[A] State can address a major social problem both by way of an administrative scheme and through penal sanctions. Administrative statutes and penal laws may have the same ultimate purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem." *New York v. Burger, supra*, 482 U.S. at p. 712. Laws prohibiting drunk driving are intended to deter and punish those who

operate a motor vehicle while under the influence of alcohol or drugs. The sobriety checkpoint program is designed to protect the lives and property of motorists whom the drunk driver threatens. This Court has recognized the vital and noncriminal interest "in ensuring the safety of the traveling public" by prohibiting the use of drugs or alcohol by those using the Nation's transportation system. *Skinner v. Railroad Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1415. This Court's cases plainly teach that a sobriety checkpoint has an administrative purpose that is distinct from the penal goal of apprehending intoxicated motorists.

-C-

We submit that this Court's administrative search precedents support the conclusion that the Michigan

sobriety checkpoint program is constitutional under the Fourth Amendment.

Beginning with *See v. City of Seattle*, 387 U.S. 541 (1967), and *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court recognized that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment without a showing of probable cause directed to a particular place or person to be searched. *See also New York v. Burger, supra*, 482 U.S. 691; *Donovan v. Dewey*, 452 U.S. 594 (1981); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Colonnade Corp. v. United States*, 397 U.S. 72 (1970).

Although *Camara* and *See* required a search warrant to conduct the administrative inspection (*see Marshall v. Barlow's, Inc., supra*, 436 U.S. at pp. 312-313), this requirement is not applicable to "pervasively regulated business[es]" (*Biswell, supra*, at p. 316) or to "closely regulated" industries "long subject to close supervision and inspection." *Colonnade, supra*, at pp. 74, 77. Additionally, a warrant is not required if obtaining one frustrates the governmental purpose behind the search (*Camara, supra*, at p. 533; *Donovan v. Dewey, supra*, 452 U.S. at p. 603), or if the purposes of the warrant requirement -- protection of privacy from unauthorized intrusion, notice to the citizen of the legal authorization, and detached scrutiny by a neutral magistrate -- are not served.

We turn to a consideration of the applicability of the search warrant and probable cause requirements.

(1)

Respondents do not, nor could they successfully, contend that a search warrant is required for the implementation of a sobriety checkpoint. To begin with, we can think of no everyday activity more heavily regulated than driving. *See New York v. Class*, 475 U.S. 106, 111-112 (1986); *Rakas v. Illinois*, 439 U.S. 128, 154 (1978) (Powell, J., concurring.) Second, the owner of a car has a lesser expectation of privacy in the vehicle than in his home or office. *See California v. Carney*, 471 U.S. 386, 392 (1985); *South Dakota v. Opperman*, 428 U.S. 364, 365 (1976); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion); *Cady v. Dombrowski*, 413 U.S. 441-442 (1973).

Third, the securing of a search warrant is completely impractical because the field officers do not anticipate

which vehicles will approach the checkpoints. Because the officers do not have probable cause to support the issuance of the warrant (*see Griffin v. Wisconsin, supra*, 483 U.S. at p. 877 & n.4) and because a warrant requirement for each car leads to inordinate or unacceptable delays, the only alternative is the issuance of a pro forma warrant broad enough to cover all prospective vehicles. In the latter case, however, little is served by the warrant requirement. A warrant notifies the citizen subject to the search or seizure that this intrusion is authorized by law and is not the random act of government agents. *Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1415; *New York v. Burger, supra*, 482 U.S. at p. 703. The Michigan law requires advance publicity of the use of checkpoints and the conspicuous use of warning signs. App. to Pet. for Cert.

152a-153a. These requirements provide assurances to the motorists of the lawful authority to conduct the checkpoint. *Cf. United States v. Martinez-Fuerte, supra*, 428 U.S. at p. 565.

In addition, the warrant requirement allows a neutral magistrate to determine whether the intrusion is justified. *See National Treasury Employees Union v. Von Raab, supra*, 109 S.Ct. at p. 1391; *United States v. Chackwick*, 433 U.S. 1, 9 (1977). But because every motorist is detained, the field officers exercise no discretion and there are no special facts for a magistrate to evaluate. *Von Raab, supra*, at p. 1391. We conclude that the Fourth Amendment does not require the issuance of a warrant.

(2)

Turning to the more general requirement of probable cause (*Skinner, supra*, at pp. 1416-1417; *Von Raab, supra*,

at p. 1391; *New Jersey v. T.L.O., supra*, 469 U.S. at p. 340), we observe that this Court has declared that the probable cause standard "'is peculiarly related to criminal investigations'" (*Colorado v. Bertine, supra*, 479 U.S. at p. 371, quoting *South Dakota v. Opperman, supra*, 428 U.S. at p. 370 n.5) and "may be unhelpful in analyzing the reasonableness of routine administrative functions . . . especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *National Treasury Employees Union v. Von Raab, supra*, 109 S.Ct. at pp. 1391-1392. It has been estimated that only one of 2000 drunk drivers is arrested, presumably upon the basis of probable cause. 4 La Fave, Search and Seizure: A Treatise on the Fourth Amendment (2d Ed. 1987)

§10.8(d) at p. 73. It is readily apparent that the probable cause standard is wholly ineffectual to further the compelling state interest of highway safety. *Cf. United States v. Martinez-Fuerte, supra*, 428 U.S. at p. 557. The remaining question is whether any particularized suspicion should be required to justify a detention at a sobriety checkpoint.

(3)

The "Fourth Amendment imposes no irreducible requirement of such [individualized] suspicion." *Id.* at p. 561. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner v. Railway*

Labor Executives Ass'n, supra, 109 S.Ct at. 1417; *accord, National Treasury Employees Union v. Von Raab, supra*, 109 S.Ct. at p. 1392. The Michigan sobriety checkpoint program is constitutional under this balancing test.

-D-

This Court's administrative search precedents require that (1) the invasion caused by the search or seizure be minimal; (2) the governmental interest be important; (3) the interest be furthered by the search; and (4) the interest be jeopardized by a requirement of individualized suspicion. *Skinner, supra*, at p. 1417; *New York v. Burger, supra*, 482 U.S. at pp. 702-703, 708-712. We turn to those considerations.

(1)

Respondents do not deny that the need to identify and remove drunk drivers from the highways is compelling,

if not absolute. This Court has lamented the "carnage caused by drunk drivers. . . ." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). The California Supreme Court documented the tragic extent of the problem:

"Nearly half of the traffic deaths in California between 1976-1980 involved drinking drivers. [Citations omitted.] Nearly one-quarter of all traffic accidents resulting in injury involved the use of alcohol. [Citations omitted.] Traffic deaths in the United States exceed 50,000 annually and approximately one-half of those fatalities are alcohol-related. [Citations omitted.]

"Indeed, in the years 1976 to 1980 there were many more injuries to California residents in alcohol-related traffic accidents than were suffered by the entire Union Army during the Civil War, and more were killed than in the bloodiest year of the Vietnam War." *Burg v. Municipal Court*, 35 Cal.3d 257, 261-262, 673 P.2d 732, 735 (1983).

The danger posed by the drunk driver on our streets and highways, is almost beyond exaggeration.

(2)

We have acknowledged that a checkpoint stop is a seizure within the meaning of the Fourth Amendment.

However, the intrusion is minimal for the following reasons.

First, there is a diminished expectation of privacy in an automobile. *United States v. Chadwick, supra*, 433 U.S. at p. 12; *California v. Carney, supra*, 471 U.S. at pp. 391-392. "There are sound reasons for this distinction [between automobiles and other locations]: Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and inspection." *Rakas v. Illinois, supra*, 439 U.S. at p. 154 n.2 (1978) (Powell, J., concurring) (emphasis added.)

Second, a checkpoint stop is less intrusive than the roving-patrol detention, which the lower court impliedly sanctioned. App. to Pet. for Cert. 20a. "Roving patrols

often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *United States v. Ortiz*, 422 U.S. 891, 894-895 (1975). "[T]he potential interference [by checkpoints] with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints. . . ." *United States v. Martinez-Fuerte, supra*, 428 U.S. at p. 559.

The Michigan courts found that the sobriety checkpoints were more intrusive than those described in *Martinez-Fuerte*, reasoning that the latter checkpoints were in fixed locations while those used in Michigan were subject to relocation. App. to Pet. for Cert. 21a-22a. This

conclusion is inconsistent with this Court's approval in dictum of license check roadblocks in *Delaware v. Prouse* (440 U.S. at p. 663), "which quite obviously cannot be maintained at a permanent location." 4 La Fave, Search and Seizure, *supra*, § 10.8(d) at p. 76. The analysis of the New York Court of Appeals places the temporary nature of a checkpoint in its proper perspective:

"Nor is constitutionality affected by the shifting and temporary nature of the checkpoints. The fact that the Supreme Court has approved permanent roadblocks but disapproved roving patrol stops is not determinative. What is critical is the intrusiveness of the checkpoint in relation to the governmental purpose involved. The subjective effect upon a vehicle driver approaching a roadblock is unrelated to whether it is permanent or was established but a few minutes before the driver approached it; in either instance his or her observation of it will be measured in minutes if not seconds. The likelihood of there being the kind of fright or annoyance that invalidates a random stop made by a roving patrol is obviated in the case of a temporary checkpoint by the visible signs of authority which the checkpoint entails -- signs announcing the purpose, lighting, and identifiable police vehicles and the observable fact that there is a uniform system for stopping cars [citations omitted]. The

only subjective difference between temporary and permanent checkpoints is that because its location is known in advance the latter can be avoided entirely by using a different route, but that difference is minimal as concerns anxiety, especially since a temporary checkpoint can also be avoided." *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 5 (1984).

In Michigan, the notice provided by the advance publicity and signs announcing the purpose of, and authorization for, the checkpoints minimized their intrusiveness for Fourth Amendment purposes.

Third, this Court has recognized that a seizure is less intrusive than a search, because only the latter impinges upon the right to privacy. *See Segura v. United States*, 468 U.S. 796, 806 (1984) (Opinion of Burger, C.J.); *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984). The Michigan sobriety checkpoint program authorizes the detention but not the search of the vehicle and its occupants. *Compare United States v. Martinez-Fuerte,*

supra, 428 U.S. 543, *with United States v. Ortiz, supra*, 422 U.S. 891. Inspection of the vehicle is limited to what can be seen without a search. *Texas v. Brown*, 460 U.S. 730 (1983). The Michigan checkpoint program apparently does not require the motorist to produce his driver's license and car registration. *See New York v. Class, supra*, 475 U.S. at pp. 113-114; *Delaware v. Prouse, supra*, 440 U.S. at p. 659. Because the motorist apparently has broken no law and thus poses no danger to the officers, he is not directed to step from his car. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *see* 4 La Fave, Search and Seizure, *supra*, § 10.8(d) at 84.

Finally, the intrusion into a person's right of privacy may be minimized by the use of a plan which sets forth neutral criteria limiting the exercise for discretion by the

in-field officers. *Brown v. Texas, supra*, 443 U.S. at p. 41.

As this Court observed in *Martinez-Fuerte*,

"checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to lawabiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." 428 U.S. at 559. (Fn. omitted.)

The Michigan checkpoint program minimizes the exercise of discretion of in-field officers to a level compatible with Fourth Amendment values. The procedures for the operation of a checkpoint are developed by supervising law enforcement personnel. Not

only does the formation of policy by high ranking personnel reduce the potential for abusive stops, it also facilitates judicial review of the operations (*ibid.*), an important consideration in Fourth Amendment cases. *See United States v. Leon*, 468 U.S. 897, 924 (1984). Under the program before this Court, sites are selected to promote safety and minimize inconvenience, every motorist is required to be diverted, and discretion is exercised only in the identification of motorists who are asked to perform a field sobriety test. Officers make that determination on the basis of specific and articulable circumstances, just as they do on traffic patrol. *Terry v. Ohio, supra*.

(3)

But it is not sufficient to establish, as we have, that the gravity of the public interest justifies the limited intrusion into the personal liberty, privacy, and dignity of

the motorists. The intrusion must also advance that public interest. *Brown v. Texas, supra*. This Court has indicated unmistakably that a checkpoint serves its purpose under the Fourth Amendment if it deters the conduct sought to be interdicted. *See Delaware v. Prouse, supra*, at p. 660; *United States v. Martinez-Fuerte, supra*, at p. 557.

Preliminarily, we make the following observations about the requirement that a checkpoint or any other program be "effective." First, just as the Fourth Amendment does not demand that any particular governmental activity be the "least intrusive" means possible to achieve the stated objective (*Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1419 n.9; *Colorado v. Bertine, supra*, 479 U.S. at pp. 373-374; *Illinois v. Lafayette*, 462 U.S. 640, 647 [1983]), neither does it require that the governmental response to a problem be

the "most effective" means available. A contrary principle would unjustifiably hamper a state in developing tools to combat social ills, for only the most effective could be used. In terms of privacy interests, it is possible that in any given situation the most effective means may also be the most intrusive. *See Von Raab, supra*, at p. 1396 n.4. The Fourth Amendment's flexible standard of reasonableness requires neither that the means be the most effective nor that they be the least intrusive.

Second, the effectiveness of a procedure is not necessarily determined by the percentage of violators who are detected. *See National Treasury Employees Union v. Von Raab, supra*, 109 S.Ct at p. 1395. In *Martinez-Fuerte*, for example, 725 deportable aliens were found in 146,000 vehicles, meaning that one alien was found for every 200 cars stopped. 428 U.S. at p. 554. This Court found that

the checkpoint was effective. By contrast, this Court condemned the procedure in *Prouse* as not "sufficiently productive to qualify as a reasonable law enforcement practice" because there was no evidence to indicate that a random stop of motorists was an effective way to identify unlicensed drivers. 440 U.S. at pp. 659-660. As Professor La Fave points out, however, the real evil in the Delaware procedure was its randomness, not its lack of efficiency. "This can only mean that because a checkpoint operation is much less intrusive and threatening than a system of random stops, it does not require nearly as strong a showing of likely 'success' in the sense of stop/apprehension percentages." 4 La Fave, Search and Seizure, *supra*, § 10.8(d) at 74.

Judged by these considerations, sobriety checkpoints have been shown to be effective. It is true that evidence

of their effectiveness is tentative, but that is primarily attributable to their recent vintage as a technique in the war against drunk driving. If the scarcity of data invalidates the use of sobriety checkpoints, they could never be employed, because no evidence of effectiveness could be developed.

Nevertheless, California's experience with sobriety checkpoints has demonstrated its value as a deterrent to drunk driving. In December of 1984, the California Highway Patrol conducted checkpoints in North Sacramento, Redding, Glendale, and Bakersfield. At those locations there were 25.6% more arrests for drunk driving, 18.8% fewer accidents, and 21.3% fewer injuries than in December 1983, before the use of checkpoints in those areas. Some 10,150 vehicles were screened in 76 hours, an average of 2.2 per minute. Department of California

Highway Patrol, Sobriety Checkpoints -- Phase I Evaluation (1985) at 5-6. Sobriety checkpoints were conducted in North Sacramento during the period May 1 - October 31, 1985. Over 12,000 vehicles were screened. Arrests increased by 1.3% in that area over the comparable period for 1984 (the statewide increase was 0.7%), accidents decreased by 12.9% (versus 6.0% statewide), and injuries decreased by 13.1% (versus 5.2% statewide). Department of California Highway Patrol -- Phase II Evaluation (1986) at 9-10.

During the period May-September 1988, the California Highway Patrol conducted 38 checkpoints which screened 33,475 vehicles. As a result, 918 field sobriety tests were conducted (2.7% of the cars) and 283 persons were arrested (0.84%). Department of California Highway Patrol, Final Report: Driving Under the Influence (DUI)

Program, May-September 1988, at 2-13. Accidents decreased by 7.1% compared to the corresponding period in 1987; the statewide decrease was only 3.7%. *Id.* at 2-15, 2-16. Arrests had also decreased: 6.2% in checkpoint areas; 8.2% statewide. *Id.* at 2-16. "This result indicated that the use of checkpoints may have successfully deterred some motorists from driving while under the influence. Newspaper articles related to the Department's operation of sobriety checkpoints may have also contributed to the deterrent effect." *Ibid.*

We believe that the California experience provides ample data to establish the effectiveness of the sobriety checkpoint program. The number of alcohol-related accidents has decreased more in the checkpoint areas than in the rest of the state. Almost one drunk driver is found in each 100 vehicles screened, a figure which compares

favorably to the national average of one arrest for each 2000 intoxicated drivers. We emphasize that the program is efficient, taking less than 30 seconds to screen each car.

(4)

Finally, we argue that the dispensation of individualized suspicion to justify the detention is necessary to effectuate the purpose of the program. See *Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1417. That purpose is to protect the lives of highway motorists. If an officer cannot stop a motorist unless he is driving erratically, official action may come too late. "First, the erratic driver may cause injury to himself or others before he is observed by patrols. Second, the ability of a drunk driver to avoid erratic movements along a roadway does not mean he will be able to respond to an emergency where prompt reflexes may be of great importance."

People v. Bartley, 109 Ill.2d 273, 486 N.E.2d 880, 886 (1985).

"[I]t is only fortuitous that an officer happens to be in a position to see a drunk entering the freeway on the off-ramp before that drunk happens to kill some innocent person. We are not likely to achieve the situation where there will be police officers available at closing time on a Labor Day weekend night at each of the locations where patrons shuffle from their favorite saloon to the parking lot. . . ." *State ex rel. Ekstrom* v. *Justice Court*, 136 Ariz.1, 668 P.2d 992, 999 (1983) (conc. opn.).

The requirement of individualized suspicion has resulted in an arrest ratio of one to 2,000 offenders and a yearly death toll of over 25,000 persons. These statistics only hint at the human suffering involved and are eloquent

evidence of the need to act in the absence of an individualized suspicion.

- E -

The vast majority of the cases to pass upon the constitutionality of sobriety checkpoints have upheld their use, either on the facts of the case or in principle. These decisions provide persuasive evidence that checkpoint programs have promoted highway safety while minimizing official intrusion into the privacy of motorists. This Court does not lightly "'brush aside the experience of States'" which cast light upon the efficacy of a procedure. *Mapp* v. *Ohio*, 367 U.S. 643, 651 (1961), quoting *Wolf* v. *Colorado*, 338 U.S. 25, 31-32 (1949).

Sobriety checkpoint programs have been upheld against constitutional challenge in Arizona (*State* v. *Superior Court*, 143 Ariz. 45, 691 P.2d 1073 [1984]);

Arkansas (*Coffman* v. *State*, 26 Ark.App. 45, 759 S.W.2d 573 [1988]); California (*Ingersoll* v. *Palmer*, 43 Cal.3d 1321, 743 P.2d 1299 [1987]); Florida (*State* v. *Jones*, 483 So.2d 433 (Fla. 1986) [dictum]; *State* v. *Abelson*, 485 So. 861 [Fla.App. 1986]); Georgia (*State* v. *Golden*, 171 Ga.App. 27, 318 S.E.2d 693 [1984]); Illinois (*People* v. *Bartley*, 109 Ill. 273, 486 N.E.2d 880 [1985], *cert. denied*, 475 U.S. 1068 [1986]); Indiana (*State* v. *Garcia*, 500 N.E.2d 158 [Ind. 1986], *cert. denied*, 481 U.S. 1014 [1987]); Iowa (*State* v. *Riley*, 377 N.W.2d 242 [Ia.App. 1985]); Kansas (*State* v. *Deskins*, 234 Kan. 102, 673 P.2d 1174 [1983]); Kentucky (*Kinslow* v. *Commonwealth*, 660 S.W.2d 677 [Ky.App. 1983], *cert. denied*, 460 U.S. 1105 [1984]); Maine (*State* v. *Leighton*, 551 A.2d 116 [Me. 1988]); Maryland (*Little* v. *State*, 300 Md. 485, 479 A.2d 903 [1984]); Massachusetts (*Commonwealth* v. *Trumble*, 396 Mass. 81, 483 N.E.2d

1102 [1985]); Mississippi (*Miller* v. *State*, 373 So.2d 1004 [Miss. 1979]); Nebraska (*State* v. *Crom*, 222 Neb. 273, 383 N.W.2d 461 [1986] [dictum]); New Jersey (*State* v. *Kirk*, 202 N.J.Super. 28, 493 A.2d 1171 [App.Div. 1985]); New Mexico (*City of Las Cruces* v. *Betancourt*, 735 P.2d 1161 [N.M. 1987]); New York (*People* v. *Scott*, 63 N.Y.2d 518, 473 N.E.2d 1 [1984]); Ohio (*State* v. *Alexander*, 22 Ohio Misc.2d 34, 489 N.E.2d 1093 [1985]); Oregon (*Nelson* v. *Lane County*, 304 Or. 97, 743 P.2d 692 [1987] [statute required under state law]); Pennsylvania (*Commonwealth* v. *Tarbert*, 517 Pa. 277, 535, 1035 [1987] [checkpoints constitutional, but prohibited by statute]); Texas (*Webb* v. *State*, 739 S.W.2d 802 [Tex.Cr.App. 1987] [dictum]); Vermont (*State* v. *Martin*, 145 Vt. 562, 496 A.2d 442 [1985]); and Virginia (*Lowe* v. *Commonwealth*, 230 Va.

346, 337 S.E.2d 273 [1985], *cert. denied*, 475 U.S. 1084 [1986]).

The cases upholding the state's right to use sobriety checkpoints employ a similar methodology: they balance the need to control drunk drivers to the end of promoting highway safety against the nature of the invasion into the privacy of the motorist. That intrusion is minimized to an acceptable level by the implementation of a program, devised by policy-making administrative officials, which circumscribes the discretion of the officers, assures a safe and well-lighted checkpoint, gives adequate warning to oncoming motorists, requires the display of legitimate policy authority, minimizes the time of detention, and provides for the detention of vehicles on a systematic, nonrandom basis. ***See, e.g., People* v. *Bartley, supra***, at pp.

887-888; *Little* v. *State, supra*, at p. 911; *State* v. *Deskins, supra*, at p. 1185; *People* v. *Scott, supra*, at p. 4.

To be sure, a number of states have prohibited the use of sobriety checkpoints on constitutional grounds. Some decisions are based in whole or in part on the jurisdiction's state constitution. *E.g., State* v. *Church*, 538 So.2d 993 (La. 1989); *State* v. *Koppel*, 127 N.H. 286, 499 A.2d 977 (1985). Other cases either rely upon considerations which are unapplicable to this case or rest upon arguments which do not withstand scrutiny. In *State* v. *Olgaard*, 248 N.W.2d 382 (S.D. 1976); *Webb* v. *State, supra*, 739 S.W.2d 802; and *City of Seattle* v. *Mesiani*, 110 Wash.2d 454, 755 P.2d 775 (1988), the courts were concerned with the considerable amount of discretion exercised by the officers, the lack of high-level supervision, or the irregular nature of the checkpoints. By contrast,

the Michigan program requires policy makers to select the sites based upon valid and neutral criteria and greatly circumscribes the discretion of the field officers.

Some courts have found the use of temporary checkpoints objectionable, purporting to distinguish *Martinez-Fuerte* on that basis. *See State* v. *Olgaard, supra*, 248 N.W.2d at p. 394; *State* v. *Smith*, 674 P.2d 562, 564-565 (Okla.Ct.Crim.App. 1984). The New York Court of Appeals met and defeated this argument in *People* v. *Scott, supra*, 473 N.E.2d at p. 6, quoted at pages 27-28 of this brief.

A few courts have invalidated checkpoint programs on the ground that there are equally effective and less intrusive means of identifying and deterring drunk drivers -- harsher penalties and observation of erratic driving by

roving patrols, for example. *State* v. *Koppel, supra*, A.2d at p. 982.

We reiterate our argument (see Part D(3)) that the reasonableness of a search or seizure does not depend upon a showing that it is the least intrusive or most effective means possible of achieving a desirable social purpose. In addition, as explained earlier, an erratic driver may cause injury before he is observed by a roving patrol.

Deterrence by means of enacting harsher penalties has superficial appeal, but the "problem is that deterrence by punishment is often ineffective unless combined with a fear of apprehension." *State ex rel. Ekstrom* v. *Justice Court*, 136 Ariz 1, 668 P.2d 992, 1000n.3. None of the 2,000 drunk drivers who are on the road at any given time fears that he will be the unlucky one to be arrested.

Other available law enforcement techniques simply do not deter. Furthermore, the courts which focus upon criminal penalties misperceive the essential purpose of sobriety checkpoints, which is to promote highway safety, not apprehend and punish criminals.

For these reasons we submit that the majority view validating sobriety checkpoint programs is also the better reasoned position. When numerical and logical superiority coincide, approval should follow. We ask this Court to approve the majority rule. The safety of thousands of motorists requires no less.

-F-

We conclude by addressing the unstated fear that the use of checkpoints is another step toward the transformation of our society into a police state in which uniformed officers are placed on every street corner, in

every public place, with citizens required to identify themselves before walking the streets, boarding common carriers, or driving the highways. Is validation of sobriety checkpoints the first step on the road to a society which is antithetical to the cherished values and beliefs supporting this nation? The answer is "no."

We do not believe that the validity of a legal proposition can be determined by carrying it to its ultimate conclusion. Crime could be deterred by placing a police officer in every home, but such a repugnant prospect cannot invalidate the use of a sobriety checkpoint as a deterrent technique. Whatever imaginary specters may haunt some, the undeniable reality is that drunk drivers are slaughtering innocents on the roads of our nation. This case addresses a specific condition which results in the deaths of thousands of Americans each year.

To combat the growing menace of the drunk driver, petitioners wish to detain vehicles at certain locations for approximately 30 seconds. There is no arrest or warrantless search. There is only a brief encounter at which trained officers quickly determine whether the operator of a 3000-pound moving machine is too drunk to maneuver it safely.

It is true that the increased fear of detention may deter other crimes, but those situations can be easily distinguished for purposes of this case:

"In drunk driving it is the very presence of the vehicle on the road which is the object to be prevented and the single thing most effectively accomplished by roadblocks. In narcotics enforcement, on the other hand, there is no assurance that roadblocks would prevent possession or sale, and there is no method of enforcement except by search of the person and vehicle itself. In my opinion, this involves too great an infringement on personal liberty. The deterrent roadblock for drunk driving would, however, force the car off the road or prevent it coming on the road, thus meeting the law enforcement objective with a very minimal infringement on personal liberty." *State ex*

rel. Ekstrom v. *Justice Court, supra*, 668 P.2d at p. 1000n.3 (conc. opn.).

In *United States v. Knotts*, 460 U.S. 276 (1983), the defendant argued that the result of upholding the use of a beeper device "would be that 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.'" *Id.* at p. 283. This Court responded to that concern:

"But the fact is that the 'reality hardly suggests abuse,' [citation omitted]; if such dragnet-type law enforcement practices as [defendant] envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." 460 U.S. at pp. 283-284.

Petitioners and *amici curiae* want to control drunk drivers with the use of checkpoints and have attempted to describe the circumstances under which the employment of checkpoints is constitutionally reasonable. Any abuse of this technique by attempted expansion to unsuitable

situations can be met with the appropriate judicial response. Until then we ask this Court to uphold the use of sobriety checkpoints.

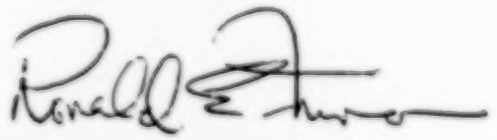
CONCLUSION

For the foregoing reasons, the judgment of the Michigan Court of Appeals must be reversed.

DATED: November 15, 1989

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

RICHARD B. IGLEHART
Chief Assistant Attorney General
JOHN H. SUGIYAMA
Senior Assistant Attorney General
MORRIS BEATUS
Supervising Deputy Attorney General



RONALD E. NIVER
Deputy Attorney General

CERTIFICATE OF SERVICE BY MAIL

Michigan Department of State Police and Col. R.T. Davis, Director the Michigan Dept. of State Police,	)	
Petitioners,	)	
v.	)	No. 88-1897
Rick Sitz, Joseph F. Young, Sr. Dominic J. Jacobetti, Dick Allen, Keith Muxlow and Jack Welborn,	)	
Respondents.	)	

RONALD E. NIVER, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 350 McAllister Street, Room 6000 in the City and County of San Francisco, State of California; that on November 16, 1989, he served true copies of the attached Brief Amici Curiae for the States of California, Florida, North Carolina and the Commonwealth of Massachusetts in the above-entitled

matter on counsel for respondent and petitioners by placing same in envelopes addressed as follows:

Mr. Thomas L. Casey
Assistant Solicitor General
753 Law Building
525 West Ottawa Street
Lansing, MI 48913

Mr. Doug Ross
National Association of
Attorneys General
Hall of the States
444 North Capitol St.
Washington, D.C. 20001

Mr. Louis Hubener
Mr. Robert A. Butterworth
Office of the Attorney
General
The Capitol
Tallahassee, FL 32399-1050

Mr. Lacy H. Thornburg
Attorney General of
North Carolina
Department of Justice
2 East Morgan Street
Raleigh, N.C. 27602

Mr. James M. Shannon
Attorney General of Massachusetts
One Ashburton Place - 20th Floor
Boston, Massachusetts 02108

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

RONALD E. NIVER
Deputy Attorney General

Subscribed and sworn to before me this
16th day of November, 1989.

Marilyn J. Mauga
Notary Public in and for said County State

MARILYN J. MAUGA
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SAN FRANCISCO
My Commission Expires August 6, 1992

No. 88-1897

Supreme Court, U.S.
FILED
NOV 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R.T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

vs.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW AND JACK WELBORN,

Respondents.

On Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF AMICI CURIAE OF THE PEOPLE OF THE STATE OF ILLINOIS, ALABAMA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, IDAHO, IOWA KANSAS, KENTUCKY, MAINE, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA AND WYOMING

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General

TERENCE M. MADSEN
MARCIA L. FRIEDL
MICHAEL J. SINGER*
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2640

*(additional counsel listed on inside cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25pp

Honorable Don Seigelman
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130

Honorable Steve Clark
Attorney General of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201

Honorable Duane Woodard
Attorney General of Colorado
1525 Sherman Street –
Second Floor
Denver, Colorado 80203

Honorable Clarine Nardi
Riddle
Acting Attorney General
of Connecticut
55 Elm Street
Hartford, Connecticut 06106

Honorable Charles M.
Oberly, III
Attorney General of
Delaware
820 North French Street,
8th Floor
Wilmington, Delaware
19801

Honorable Michael J. Bowers
Attorney General of
Georgia
132 State Judicial
Building
Atlanta, Georgia 30334

Honorable Jim Jones
Attorney General of
Idaho
State House
Boise, Idaho 83720

Honorable Tom Miller
Attorney General of
Iowa
Hoover Building –
Second Floor
Des Moines, Iowa 50319

Honorable Robert T.
Stephan
Attorney General of
Kansas
Judicial Center –
Second Floor
Topeka, Kansas 66612

Honorable Frederic J.
Cowan
Attorney General of
Kentucky
State Capitol, Room 116
Frankfort, Kentucky
40601

Honorable James E.
Tierney
Attorney General of
Maine
State House
Augusta, Maine 04330

Honorable J. Joseph Curran, Jr.
Attorney General of Maryland
Munsey Building
Calvert and Fayette Streets
Baltimore, Maryland 21202-1909

Honorable Hubert H. Humphrey, III
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155

Honorable William L. Webster
Attorney General of Missouri
Supreme Court Bldg.
101 High Street
Jefferson City, Missouri 65102

Honorable Marc Racicot
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620

Honorable John P. Arnold
Attorney General of New Hampshire
208 State House Annex
Concord, New Hampshire 03301

Honorable Peter N. Perretti, Jr.
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN080
Trenton, New Jersey 08625

Honorable Hal Stratton
Attorney General of New Mexico
Bataan Memorial Bldg.
Galisteo Street
Santa Fe, New Mexico 87503-1508

Honorable Robert Abrams
Attorney General of New York
120 Broadway, 25th Floor
New York, New York 10271

Honorable Lacy H. Thornburg
Attorney General of North Carolina
Department of Justice
2 East Morgan Street
Raleigh, North Carolina 27602

Honorable Nicholas Spaeth
Attorney General of North Dakota
Department of Justice
2115 State Capitol
Bismarck, North Dakota 58505

HONORABLE ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio
State Office Tower
30 E. Broad Street
Columbus, Ohio 43266-0410

HONORABLE T. TRAVIS MEDLOCK
Attorney General of South Carolina
Rembert Dennis Office Building
1000 Assembly Street
Columbia, South Carolina 29211

HONORABLE ROGER A. TELLINGHUISEN
Attorney General of South Dakota
State Capitol Building
Pierre, South Dakota 57501

HONORABLE MARY SUE TERRY
Attorney General of Virginia
Attn: Deborah Love-Bryant
101 N. 8th Street
5th Floor
Richmond, Virginia 23219

HONORABLE JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

QUESTION PRESENTED

Where the Michigan courts concluded that the sobriety checkpoint program addresses an issue of legitimate public concern; that it would have some effectiveness; and that objectively it would be only minimally intrusive, is the checkpoint program facially unconstitutional in violation of U.S. Const. Amend. IV merely because the Michigan courts also found that it would not be as effective as other law enforcement methods and that it would have a potential for generating subjective surprise and fear in some motorists?

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT IN SUPPORT OF MICHIGAN	4
I. DUI ROADBLOCKS ARE NOT *PER SE* UNCONSTITUTIONAL	4
II. DUI ROADBLOCKS ARE AN EFFECTIVE AND EFFICIENT WEAPON IN THE WAR AGAINST DRINKING DRIVERS	10
CONCLUSION	17

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. Texas, 443 U.S. 47 (1979) 1, 4, 5, 6, 9

City of Seattle v. Mesiani, 110 Wash.2d 454, 755 P.2d 775 (1988) 5

Commonwealth v. McGeoghegan, 389 Mass. 137, 449 N.E.2d 349 (1983) 6

Commonwealth v. Tarbert, 517 Pa. 277, 535 A.2d 1035 (1987) 5

Delaware v. Prouse, 440 U.S. 648 (1979) 4, 6, 16

Illinois v. LaFayette, 462 U.S. 640 (1983) 10

Kinslow v. Commonwealth, 660 S.W.2d 677 (Ky. App. 1983) 14

People v. Bartley, 109 Ill.2d 273, 486 N.E.2d 880 (1985) 13

People v. Scott, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984) 12, 15

People ex rel. Ekstrom v. Justice Court, 136 Ariz. 1, 663 P.2d 992 (1983) 7

State v. Barcia, 228 N.J. Super. 267, 549 A.2d 491 (1988) 7

State v. Boyanovsky, 304 Ore. 131, 743 P.2d 711 (1987) 5

State v. Crom, 222 Neb. 273, 383 N.W.2d 461 (1986) 6

State v. Halverson, 277 N.W.2d 723 (S.D. 1979) 6

State v. Henderson, 114 Idaho 293, 756 P.2d 1057 (1988) 5

TABLE OF AUTHORITIES – Continued

Page(s)

State v. Jones, 483 So.2d 433 (Fla. 1986) 6

State v. Koppel, 127 N.H. 286, 499 A.2d 977 (1985) 5

State v. Muzik, 379 N.W.2d 599 (Minn. App. 1985) 6

State v. Olgaard, 248 N.W.2d 392 (S.D. 1976) 6

State v. Smith, 674 P.2d 562 (Okl. Cr. 1984) 6

State v. Superior Court, 143 Ariz. 45, 691 P.2d 1073 (1984) 7, 12, 13

Texas v. Brown, 460 U.S. 730 (1981) 16

United States v. Brigoni-Ponce, 422 U.S. 873 (1975) 4

United States v. Kaye, 739 F.2d 488 (9th Cir. 1984) 7

United States v. Martinez-Fuerte, 428 U.S. 543 (1975) ..*passim*

United States v. Miller, 608 F.2d 1089 (5th Cir. 1979) 7

United States v. Prichard, 645 F.2d 854 (10th Cir. 1981) 7

Webb v. State, 695 S.W.2d 676 (Tex. App. 5th Dist. 1985) *aff'd* 739 S.W.2d 802 (Tex. Crim. 1987) 6

OTHER AUTHORITIES

Report No. NTSB/SS – 84/01, National Transportation Safety Board, Safety Study, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations* 11

"Police plan beefed up Labor Day traffic enforcement," U.P.I. wire, August 27, 1986, Wednesday, BC cycle (Available on Lexis/Nexis) 12

U.P.I. Wire, May 18, 1987, Monday, BC cycle (Available on Lexis/Nexis) 13

FY-89 R.A.I.D/D.U.I.E. Report, August 18, 1989 15

INTEREST OF THE AMICI CURIAE

Pursuant to Rule 36.5 of the Rules of this Court, the States identified above submit this brief as amici curiae in support of the Petitioner, Michigan Department of State Police.

The amici States, represented by their chief legal officers, strongly support Michigan's effort on behalf of the lives and safety of our citizens.

Each year more than 20,000 persons are killed in alcohol-related traffic accidents in this country. One in every four drivers involved in a fatal crash is drunk at the time. Traffic-related incidents are the largest single cause of death of individuals between the ages of 5 and 34. More than half of these deaths are alcohol-related.

The amici States are at war with this scourge. This war can only be won through a combination of arrest, deterrence and education. The amici States have determined that DUI roadblocks serve these functions with a minimal but necessary inconvenience to our motorists. We urge this Court to agree.

SUMMARY OF THE ARGUMENT

DUI roadblocks are not *per se* unconstitutional. The reasonableness of a seizure under the fourth amendment must be determined by weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances those public interests, and the severity of the interference with individual liberty. *Brown v. Texas*, 443 U.S. 47 (1979).

Public concern over alcohol-related traffic accidents and deaths is both substantial and well-founded. The States are attempting to address this concern through a combination of innovative police tactics, steeper criminal sanctions and broad-based educational and public awareness programs.

Roadside safety checks and DUI (driving under the influence) roadblocks combine enforcement mechanisms with public awareness. As such, the States contend that roadblocks serve as an efficient and effective deterrent device. They not only result in DUI and other alcohol-related citations, but they often act in combination with public awareness campaigns to deter potential drinking drivers from getting behind the wheel at all. A study by the Illinois State Police, under the direction of Jeremy Margolis, indicates that roadside safety checks result in an efficient allocation of resources in the war against drunk driving.

Sobriety checkpoints are perhaps the most visible aspect of a crackdown on drunk driving and afford police the opportunity to contact greater numbers of motorists than during typical patrol procedures. The amici States contend that their use increases public perceptions of the likelihood that DUI offenders will be arrested and of the locality's commitment to the problem. It is this public awareness and the short-term deterrent effect which results from these campaigns which provide the state with a deterrent mechanism available from no other source.

Finally, the interference to individual liberty which results from these checkpoints is minimal. As illustrated by the facts of this case, there is nothing inherent in DUI

roadblocks that would preclude their operation in a manner causing only minimal intrusion on the motoring public. First, police implemented the roadcheck pursuant to established administrative procedures specifically designed to minimize intrusion. Second, the objective intrusion involved was certainly no more than that sanctioned in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1975). There motorists were not only stopped for a visual inspection of the vehicle and its occupants, but were subject to referral to a secondary inspection area for questioning and the possible production of documentation. This procedure averaged three to five minutes. 428 U.S. at 546, 547. Drivers in the present case were merely stopped while police explained the reason for the checkpoint and inspected their cars and persons only insofar as the officers could observe potential violations from without the vehicle. If no violations were detected, the entire process averaged less than twenty-five seconds. In addition, it is evident from the operation of this roadblock that the safety of the motorists was of paramount concern. The checkpoint area was lighted, and traffic controlled prior to the stop of an individual auto by use of reflectorized signs, orange cones and fusees which were used to funnel vehicles into one lane.

On the record presently before this Court, it is clear that specific criteria were utilized in determining the need for and location, timing, and duration of the roadblock. Individual discretion was minimal.

In conclusion, the amici States respectfully suggest that the thirty-second delay occasioned in these checkpoints is a very small price to pay for the knowledge that the vehicles around you meet essential basic safety standards and are being driven by sober licensed drivers.

ARGUMENT IN SUPPORT OF MICHIGAN

I.

DUI ROADBLOCKS ARE NOT *PER SE* UNCONSTITUTIONAL.

The reasonableness of a seizure under the fourth amendment must be determined by weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances those public interests, and the severity of the interference with individual liberty. *Brown v. Texas*, 443 U.S. 47 (1979).

In *United States v. Brigoni-Ponce*, 422 U.S. 873 (1975), this Court applied these principles and held that the government's interest in apprehending illegal aliens does not outweigh the invasion of privacy occasioned by the use of roving patrols, which make wholly discretionary vehicle stops for brief questioning of occupants at non-border locations, where the effectiveness of such patrols would not be defeated by imposition of a reasonable suspicion requirement. However, a year later, this Court held that the same governmental objective outweighed the individual's privacy rights when effectuated by means of a permanent checkpoint which by its nature both appeared to involve and actually permitted less discretionary enforcement activity. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Similarly, although this Court has ruled that random stops to ensure compliance with licensing, registration and vehicle safety requirements were unconstitutional, *Delaware v. Prouse*, 440 U.S. 648 (1979), also assured that the states were not precluded from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. One possible alternative to

the roving patrol suggested by the Court was the questioning of all on-coming traffic at roadblock-type stops. *Id.* at 663. This alternative was specifically found permissible in *Texas v. Brown*, 460 U.S. 730 (1981), where police established a temporary routine driver's license checkpoint during the late evening hours.

As the appendix to the Petition for Writ of Certiorarai indicates, the overwhelming majority of state appellate courts that have faced the issue before this Court have rejected constitutional challenges to DUI roadblocks. *See* Petition at Appendix 165a.

Of the courts that have struck down implementation of DUI roadblocks, one did so explicitly on state statutory grounds, without addressing the constitutional issue. *See Commonwealth v. Tarbert*, 517 Pa. 277, 535 A.2d 1035 (1987). Four did so exclusively on state constitutional grounds. *See State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988); *City of Seattle v. Mesiani*, 110 Wash.2d 454, 755 P.2d 775 (1988); *State v. Boyanovsky*, 304 Ore. 131, 743 P.2d 711 (1987); *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985). Several of the courts ruling in these cases have implicitly recognized that this Court's decisions in *Brown* and *Martinez-Fuerte* weigh in favor of the constitutionality of roadblocks. Indeed, in striking the roadblock at issue before it, the New Hampshire high court stressed that the New Hampshire constitution affords "significantly greater protection than the fourth amendment against intrusion by the state." *Koppel*, 127 N.H. 291, 499 A.2d at 981.

Still another court which has struck down its state's use of DUI roadblocks indicated that it might approve a

roadblock if a judicial warrant authorizing one were obtained. *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976). However, *Olgaard*, which was decided prior to *Brown* and *Prouse*, presumed that *Martinez-Fuerte* required checkpoints to be permanent. In a later case, the South Dakota Supreme Court, citing *Prouse*, recognized that when wild game checks are operated so as to stop all vehicles with a clear showing of police authority, they do not entail the evils characterized by roving patrols. *State v. Halverson*, 277 N.W.2d 723 (S.D. 1979).

Other courts stressed the lack of an existing administrative plan to guide law enforcement officials in implementing checkpoints. The absence of such guidance allows police subterfuge or leads to the kind of unfettered police discretion disapproved by this Court in *Prouse*. E.g. *State v. Smith*, 674 P.2d 562 (Okl. Cr. 1984); *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986); *Webb v. State*, 695 S.W.2d 676 (Tex. App. 5th Dist. 1985) *aff'd* 739 S.W.2d 802 (Tex. Crim. 1987); *State v. Muzik*, 379 N.W.2d 599 (Minn. App. 1985).

Finally, while the courts in *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983), and *State v. Jones*, 483 So.2d 433 (Fla. 1986), indicated that properly instituted DUI roadblocks may well constitute reasonable intrusions under the fourth amendment, they found the checkpoints before them deficient because the records did not establish the stops as safe, effective, or as involving the exercise of minimal discretion by field officers. Indeed, almost all of the courts that have struck down particular roadblocks recognized that a properly instituted DUI roadblock may well constitute reasonable intrusion under the fourth amendment if they were

implemented safely, effectively, and pursuant to established administrative procedures. *Compare, e.g., People ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983) (striking down roadblock because police retained unfettered discretion) *with State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984) (upholding roadblock because concerns expressed in *Ekstrom* had been met).

Thus, the Michigan appellate court in this case, along with the New Jersey Superior Court, *see State v. Barcia*, 228 N.J. Super. 267, 549 A.2d 491 (1988), stand alone in holding that DUI roadblocks executed pursuant to either a legislative or administrative plan unequivocally violate the fourth amendment. All other courts that have struck down DUI roadblocks, on other than state constitutional grounds, have left open the possibility that a better conceived plan or better police execution might allow a DUI roadblock to pass constitutional muster.

Even those more general concerns expressed by the courts that rejected the use of roadblocks are not fatal to their constitutionality. For instance, *Texas v. Brown* makes clear that permanency of a roadblock is not a constitutional prerequisite. *See* 460 U.S. at 733. *See also United States v. Prichard*, 645 F.2d 854 (10th Cir. 1981) (license check); *United States v. Miller*, 608 F.2d 1089 (5th Cir. 1979) (license check); *United States v. Kaye*, 739 F.2d 488 (9th Cir. 1984) (alien check).

Neither must the public necessarily have prior knowledge of the specific operation of a roadblock, particularly where advance warning of the location and timing would undermine its effectiveness. *See Kaye, supra*. In *Martinez-Fuerte*, publication of the location and timing of

the stops did not significantly hinder their main purpose of detecting illegal aliens insomuch as the checkpoints were located on those important highways offering a safe and expeditious route to the interior, and violators who knew of the roadblocks were forced into less efficient, slower, and less traveled roads where they would be more vulnerable to roving patrols. A major purpose of sobriety checkpoints, however, is not only to apprehend drunk drivers before they kill or maim, but to deter those drivers from being on the roads in the first instance. *See* page 12-13, *infra*. Obviously, intoxicated persons will more likely be deterred from driving altogether if they cannot ascertain precisely where or when the law enforcement operation will be conducted.

What is essential in the context of an objectively limited stop such as those contemplated in *Martinez-Fuerte, Prouse* and *Brown* is that the checkpoint not appear to or actually involve a significant amount of discretionary enforcement activity. As the Court in *Martinez-Fuerte* emphasized, where traffic is detained in a regularized manner with a show of police authority, the motorist is able to perceive that he is not being singled out for inspection and may assume that the stops are duly authorized as serving the public interest. Further, since only those cars approaching the checkpoint may be detained, the potential for the harassment found in roving patrol stops is minimized. Finally, when the location and timing of a checkpoint is chosen by supervisory personnel responsible for determining the most effective allocation of limited resources, it may be assumed that the operation will not be located and timed so as to bear arbitrarily or oppressively on motorists as a class.

As illustrated by the facts of this case, there is nothing inherent in DUI roadblocks that would preclude their operation in a manner causing only minimal intrusion on the motoring public. First, police implemented the roadcheck pursuant to established administrative procedures specifically designed to minimize intrusion. Second, the objective intrusion involved was certainly no more than that sanctioned in *Martinez-Fuerte*. There, motorists were not only stopped for a visual inspection of the vehicle and its occupants, but were subject to referral to a secondary inspection area for questioning and the possible production of documentation. This procedure averaged three to five minutes. 428 U.S. at 546, 547. Drivers in the present case were merely stopped briefly to allow police to explain the reason for the checkpoint and to inspect their cars and persons only insofar as the officers could observe potential violations from without the vehicle. If the police detected no violations, the entire process averaged less than twenty-five seconds. Second, it is evident from the operation of this roadblock that the safety of the motorists was of paramount concern. The checkpoint area was lighted, and traffic was controlled prior to the stop of an individual auto by use of reflectorized signs, orange cones and fusees which were used to funnel vehicles into one lane.

On the record presently before this Court, it is clear that specific criteria were utilized in determining the need for and location, timing, and duration of the roadblock. This is precisely what this Court's prior decisions in *Martinez-Fuerte, Prouse,* and *Brown* require.

II.

DUI ROADBLOCKS ARE AN EFFECTIVE AND EFFICIENT WEAPON IN THE WAR AGAINST DRINKING DRIVERS.

The amici states respectfully suggest that the analysis utilized by the Michigan Court of Appeals was incorrect. Relying on what it interpreted as a low actual arrest rate and an uncertain deterrent effect, the Court concluded that the program was not effective. The Court then went on to conclude that these perceived failures, in combination with the existence of more effective alternatives, caused the program to fail to qualify as a reasonable seizure under the Fourth Amendment.

Contrary to the finding of the Court below, however, the perceived existence of less intrusive, or arguably more effective, means of enforcement is not fatal to the procedure. This Court has consistently rejected the notion that seizures are constitutionally impermissible merely because less burdensome methods could conceivably be employed to effectuate the same governmental interests sought to be advanced. Rather, it is sufficient that a particular search or seizure amply served the important and legitimate interests involved. *Illinois v. LaFayette*, 462 U.S. 640, 647 (1983). *See also Martinez-Fuerte, supra*, 428 U.S. at 557, n. 12.

While the lower courts have properly recognized that roving patrols have proven to be a more effective means of attaining DUI arrests to some extent, it is nonetheless apparent that these measures, even when employed in conjunction with stiffer DUI penalties have not adequately addressed the problem of drunk driving.

An April 3, 1984, safety study published by the National Transportation Safety Board[1] ("NTSB") observes that despite the recent nationwide increase in legislative and countermeasure activity, roughly the same percentage (55%-58%) of all highway fatalities each year involve alcohol. (Study, p. 1) Data utilized by the study reflects that in 1982 alone, approximately 25,600 persons died in alcohol related accidents. Each year, nearly 670,000 persons are injured and some 1,200,000 accidents result in property damage. (Study, p. 1) Based upon (1) estimates of the probability of arrest for DUI varying from 1 in 200 drunk drivers to 1 in 2,000 and (2) a nationwide telephone survey indicating that between 1/4 and 1/3 of drinking drivers feel that the chances of apprehension and punishment are not great enough to prevent them from driving after drinking, the study concludes that many intoxicated drivers persist in their behavior because they perceive a low risk of arrest. (Study, p. 3)

Specifically with respect to DUI roadblocks, the NTSB study notes that while sobriety checkpoints may not be the most efficient arrest producing technique, data from the District of Columbia, Maryland and Delaware reflect that they do generate a significant number of DUI arrests. (Study, pp. 9, 10)

---

[1] Report No. NTSB/SS – 84/01 entitled National Transportation Safety Board, Safety Study, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations* containing 63 pages available through the National Technical Informative Service, Springfield, Virginia 22161.

More important is the study's recognition of the deterrent potential for DUI roadblocks. First, they preclude drunk drivers from assuming that they can avoid police detection by simply driving cautiously. (Study, p. 5) Futhermore, where an individual is intoxicated, a self-evaluation of his ability to drive without manifesting his condition is certainly suspect. It is beyond dispute that a drunk driver's ability to avoid weaving along the roadways does not necessarily assure his ability to handle an emergency situation where quick perception and reflex are of paramount importance.

Moreover, sobriety checkpoints are perhaps the most visible aspect of a crackdown on drunk driving and afford police the opportunity to contact a greater number of motorists than during typical patrol procedures. Their use will thereby increase public perceptions of both the likelihood that DUI offenders will be arrested and the locality's commitment to addressing the problem. (Study, p. 9). See also *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073, 1076-77 (1984) (discussing deterrent advantage); *People v. Scott*, 63 N.Y.2d 518, 527, 473 N.E.2d 1, 4-5, 483 N.Y.S. 2d 649, 652-53 (1984) (same).

For instance, States often institute DUI roadblocks during holidays and at other times of the year when highway traffic is particularly high and when the potential impact of drunk driving on public safety is substantially greater.[2] These well-publicized roadblocks can be a significant short-term deterrent to drunk driving and, as

---

[2] *See*, e.g., "Police plan beefed up Labor Day traffic enforcement," U.P.I. wire, August 27, 1986, Wednesday, BC cycle (Available on Lexis/Nexis):

(Continued on following page)

a result, bestow a significant benefit on the driving public. Therefore, contrary to the assertion of the lower court, the significant public benefit of *short-term* deterrence under such circumstances can neither be minimized nor denied. *See State v. Superior Court*, 691 P.2d at 1076-77 (stressing validity of proven short-term deterrence as a factor in favor of constitutionality "particularly . . . in light of the fact that a high percentage of alcohol related accidents traditionally occur in December"). *See also People v. Bartley*, 109 Ill.2d 273, 291-92, 486 N.E.2d 880 (1985) (same).

(Continued from previous page)

> Illinois State Police will be beefing up traffic law enforcement over the Labor Day weekend, officials said Wednesday.
>
> State Police Superintendent Laimutis Nargelenas said police will be especially tough on drunk drivers. Road blocks to check for drunken driving are expected throughout the state, especially along the Illinois-Wisconsin border.
>
> The Illinois-Wisconsin line is known as the "bloody border" because of the large number of alcohol-related traffic accidents that occur along it.
>
> "More people will be traveling this weekend because gas is cheap, and that increases the odds for traffic fatalities," said Bob Fletcher, a spokesman for the Illinois State Police Department.
>
> * * *
>
> The increased traffic law enforcement begins Friday and will run through Monday.

See also U.P.I. Wire, May 18, 1987, Monday, BC cycle (Available on Lexis/Nexis) (reporting Illinois's institution of roadblocks over Memorial Day weekend).

The Michigan court, while finding that the roadblock in this case did have a short-term deterrent impact on drunk driving nonetheless held that it was not effective. However, as the Arizona Supreme Court recognized in *Superior Court*, if the State can prove short-term deterrence of drunk driving, it has established not only a valid purpose for a DUI roadblock, but has also demonstrated a particular kind of effectiveness. Thus, the Michigan court's conclusions that the roadblock was not effective is inherently contradictory to its finding that it had a short-term deterrent impact on drunk driving.

In any event, *Martinez-Fuerte* makes clear that where the selective referral of motorists for further investigation involves only minimal intrusion, it need not be justified by any particular reason, 428 U.S. at 559, 560, 563. *See also Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. App. 1983) (where field officers' discretion in conducting DUI roadblock was found sufficiently constrained because all vehicles were stopped).[3]

---

[3] In *Martinez-Fuerte*, the Court found that operation of the checkpoint there need not have been authorized by a warrant because (1) the stopping of an automobile for questioning as to residence is a "minor interference" with privacy; (2) visible manifestations of police presence provide assurance to motorists that the stop is authorized; (3) the reasonableness of checkpoint stops depends upon factors not susceptible to the distortion of hindsight; and (4) the need to substitute the judgment of a magistrate for that of the field officer is reduced when the decision to seize is not entirely in the hands of the officer and deference is to be given to the administrative decisions of supervisory personnel. 428 U.S. at 565, 566.

With respect to the State's interest in conducting DUI roadblocks, the issue is not whether the use of checkpoints in isolation is more effective than other means in combating the DUI problem, but whether the particular law enforcement needs served by checkpoints, when employed in conjunction with other efforts, can be met without reliance on their use. *See Martinez-Fuerte*, 428 U.S. at 556, n. 14. As noted in *People v. Scott*, 63 N.Y.2d 518, 524, 473 N.E.2d 1, 6, 483 N.Y.S.2d 649, 655 (1984), "the State is entitled in the interest of public safety to bring all available resources to bear, without having to spell out the exact efficiency coefficient of each component and of the separate effects of any particular component." Nonetheless, a recent study conducted by the Illinois State Police, under the direction of Jeremy Margolis,[4] indicates that roadside safety checks result in an efficient allocation of resources in the war against drunk driving when compared against roving patrols. While roving patrols proved to be more efficient in most cases where DUI charges resulted,[5] the roadside checks proved more efficient when all alcohol-related charges were taken into consideration.[6]

---

[4] FY-89 R.A.I.D./D.U.I.E. Report, August 18, 1989, Available from Illinois Department of State Police, 401 Armory Building, Springfield, Illinois, 62706

[5] The study, which was conducted in 21 state police districts over a one-year period, found roadside safety checks to be more efficient in terms of DUI arrests per man-hours in one of the twenty-one districts. Overall, roving patrols resulted in one DUI/drug arrest for every 16.12 hours expended. Roadside safety checks required 30.49 man-hours.

[6] The study found the checks to be more efficient in terms of alcohol-related arrests per man-hours in 8 of the 21 participating state police districts as well as on the state-wide average. Overall, roving patrols resulted in one alcohol-related citation for every 6.46 man-hours expended. Roadside checks required 5.76 man-hours.

The statistics used by the court below do not address this efficiency issue. While recent enactment of tougher DUI laws, enhancement of roving patrols, and education of the public may well be advancing the fight against drunk driving to some extent, making a "dent" in the problem can hardly be considered satisfactory where the potential for death and serious injury is involved. None of the alternative methods of enforcement addresses the need to detect drinking drivers who will not manifest intoxicated behavior until confronted with an emergency on the road and the need to deter drinkers who perceive themselves capable of driving cautiously. During the one-year test period completed in Illinois, Roadside Safety Checks resulted in 228 DUI/drug arrests and 1207 total alcohol-related citations.

In *Martinez-Fuerte*, the Court specifically noted that the practice of stopping automobiles briefly for questioning to enforce laws regarding driver's licenses, safety requirements, weight limitations and similar matters had a long history evidencing its utility. This is accepted by motorists as incident to highway use. 428 U.S. at 560, n. 14. Similarly, the Court in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), suggested the stopping of all on-coming traffic as a possible alternative to random stops to check licenses and registration. Moreover, while the defendant in *Texas v. Brown*, 460 U.S. 730 (1983), did not contest the legality of his late-night stop at a temporary license checkpoint, the Court, citing *Prouse*, affirmatively stated that the validity of the procedure was beyond dispute. 460 U.S. at 740-41. Finally, the amici States note that the NTSB study reflects that the very public subjected to this law enforcement method appears to overwhelmingly approve of its

use. While public approval alone cannot serve as a basis for allowing a seizure, it does serve as evidence of the public's recognition of the minimal scope of the intrusion inherent in a stop of this nature. The amici States ask this Court to agree with those drivers in concluding that thirty-second delay is a very small price to pay for the knowledge that the vehicles around you meet essential basic safety standards and are being driven by sober licensed drivers.

CONCLUSION

For all the foregoing reasons, the amici States respectfully request this Court to reverse the decisions of the Michigan courts.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General
State of Illinois

TERENCE M. MADSEN

MARCIA L. FRIEDL

MICHAEL J. SINGER
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2640

MOTION FILED
NOV 16 ...

(17)

COPY

No. 88-1897

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHIGAN DEPARTMENT OF STATE POLICE, and COL. R. T. DAVIS, Director,

PETITIONER,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF PETITIONER

Appellate Committee of
The California District
Attorneys Association by
IRA REINER
District Attorney
County of Los Angeles
HARRY B. SONDHEIM
Head, Appellate Division
Counsel of Record:
DIRK L. HUDSON
Deputy District Attorney
849 South Broadway, 11th Floor
Los Angeles, CA 90014-3570
Telephone: (213) 974-5921

27 pp

TABLE OF CONTENTS

	Pages
MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF THE MICHIGAN DEPARTMENT OF STATE POLICE	1
INTEREST OF *AMICUS CURIAE*	2
BRIEF OF AMICUS CURIAE	
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I NO DEFERENCE IS OWED TO THE FACTUAL FINDINGS OF THE MICHIGAN TRIAL COURT	5
II AFTER CONSIDERING THE COMPELLING STATE INTEREST AND LIMITED INTRUSION INVOLVED, THE MAJORITY OF APPELLATE DECISIONS, HAVE HELD SOBRIETY CHECKPOINTS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT	9
A Introduction	9
B Survey of Sister State Decisions	11
C Independent Analysis	16
CONCLUSION	20

TABLE OF AUTHORITIES

Pages

CASES

Breithaupt v. Adam, 352 U.S. 432 (1957) — 20

Brown v. Texas, 443 U.S. 47 (1979) — 10-12, 15-17

Burg v. Municipal Court, 35 Cal.3d 257 (1983) — 9, 18

Cady v. Dombrowski, 413 U.S. 433 (1973) — 17

City of Las Cruces v. Betancourt, 735 P.2d 1161 (N.M. 1987) — 12

City of Seattle v. Mesiani, 755 P.2d 775 (Wash. 1988) — 13, 14, 16

Commonwealth v. McGeoghegan, 449 N.E.2d 349 (Mass. 1983) — 14

Commonwealth v. Tarbert, 502 A.2d 221 (Pa. 1985) — 11, 14

Commonwealth v. Trumble, 83 N.E.2d 1102 (Mass. 1985) — 13, 14

Delaware v. Prouse, 440 U.S. 648 (1979) — 7, 10, 15, 17

First Nat. Bank of Hartford, Wis. v. City of Hartford, et al., 273 U.S. 548 (1927) — 6

Fury v. City of Seattle, 730 P.2d 62 2 (Wash. 1986) — 13

Higbie v. State, 1989 WL 118822 (Tex.Cr.App. 1989) — 16

In re Lance W., 37 Cal.3d 873 (1985) — 11

Ingersoll v. Palmer, 43 Cal.3d 1321 (1987) — 6

Jones v. State, 459 So.2d 1068 (Fla.App. 1984) — 14

Kinslow v. Commonwealth, 660 S.W.2d 677 (Ky.App. 1983) — 13

Little v. State, 479 A.2d 903 (Md.App. 1984) — 13

Low v. Commonwealth, 337 S.E.2d 273 (Va. 1985) — 13

Nelson v. Lane, 743 P.2d 692 (Ore. 1987) — 12

People v. Bartley, 486 N.E.2d 880 (Ill. 1985) — 9, 13, 17, 18

People v. Martin, 496 A.2d 442 (Vt. 1985) — 13, 15, 17

People v. Scott,473 N.E.2d 1 (N.Y.App. 1984) 13

Peterson v. Superior Court, (19 .. Cal.3d 147 9

Sitz v. Department of State Police, 429 N.W.2d 180 (Mich., 1988) 5-7, 16

Snyder v. State,538 N.E.2d 961 (Ind. 1989) 12

State ex rel. Ekstrom v. Justice Court of State, 663 P.2d 992 (Ariz. (1983) 14

State v. Boyanovsky, 743 P.2d 711 (Ore. 1987) 14, 15

State v. Church, 530 So.2d 1235 (La. 1988) 12, 19

State v. Cocomo, 427 A.2d 131 (N.J. Super. L. 1980) 13

State v. Crom, 383 N.W.2d 461 (Neb. 1986) 15

State v. Deskins, 673 P.2d 1174 (Kan. 1983) 13

State v. Garcia, 481 N.E.2d 148 (Ind.App. 1985) 12, 13

State v. Golden, 318 S.E.2d 693 (Ga.App. 1984) 13

State v. Henderson, 756 P.2d 1057 (Ida. 1988) 14, 16

State v. Koppel, 499 A.2d 977 (1985) 11, 14

State v. Marchand, 706 P.2d 225 (Wash. 1985) 15

State v. McLaughlin, 471 N.E.2d 1125 (Ind.App. 1984) 12, 13

State v. Muzik, 379 N.W.2d 599 (Minn. 1985) 15

State v. Olgaard, 248 N.W.2d 392 (S.D. 1976) 10, 15

State v. Record, 548 A.2d 422 (Vt. 1988) 12

State v. Smith, 674 P.2d 711 (Okla. 1984) 14, 15, 18

State v. Superior Court in and for County of Pima, 691 P.2d 1073 (Ariz. 1984) 13, 14

State v. Welch, 755 S.W.2d 624 (Mo. 1988) 12

United States v. Bowles, 625 F.2d 526 (5th Cir., 1980) 6

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 18

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 4, 5, 10, 12, 15, 17

United States v. Mendenhall, 446 U.S. 544 (1980) 6

United States v. Pugh, 99 U.S. 265 (1879) 6

Williams v. North Carolina, 325 U.S. 226 (1945) 7

UNITED STATES RULES OF COURT

Rule 36.2 2

Rule 36.3 1

Section 36.4 2

CALIFORNIA CONSTITUTION

Article I, section 28, subdivision (d) 11

No. 88-1897

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

MICHIGAN DEPARTMENT OF STATE POLICE,
and COL. R. T. DAVIS, Director,

PETITIONERS,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW and JACK WELBORN,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

MOTION FOR LEAVE TO FILE
BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF
THE MICHIGAN DEPARTMENT OF STATE POLICE

Pursuant to Rule 36.3, Rules of the Supreme Court of the United States, ***amicus curiae***, the Appellate Committee of the California District Attorneys Association, including the District Attorney of Los Angeles County, hereby moves for leave of this Court to file the attached amicus curiae brief in support of the Michigan Department of State Police.

Pursuant to Rule 36.2, Rules of the Supreme Court of the United States, *amicus* sought written consent of all parties to the case to file this brief. Although petitioners did grant consent, respondents refused.

The California District Attorneys Association is an association of District Attorneys who are authorized law officers of the State of California and of the counties they represent, including the County of Los Angeles, such counties being political subdivisions of the state. Thus, had the members of this association individually and separately sought to file this brief, consent would not have been required. (See Rule 36.4, Rules of the Supreme Court of the United States).

In the event that this Court is not inclined to grant leave to file this brief on behalf of the Association, *amicus* respectfully requests that it be filed on behalf of the District Attorney of Los Angeles County alone under Rule 36.4.

Amicus believes that other briefs before this Court do not deal, at least in depth, with the two major issues included in this brief: (1) the procedural issue as to the degree of deference (if any) required to be accorded the findings of the Michigan trial court; (2) the substantive survey in depth of the decisional law of the several states dealing with the constitutionality of sobriety checkpoints. Hence, it is submitted that the brief of amicus will be helpful to this Court.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association cconsisting of the District Attorneys of the State of California aand their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney

of Los Angeles County. Upon review of the instant matter -- which raises the question of, e.g., the methods by which society can protect itself from the appalling carnage wrought on the nation's highways by drunk drivers -- the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of criminal justice throughout California. It is for this reason that the Committee seeks leave to file the attached amicus curiae brief herein.

Respectfully submitted on behalf of the California District Attorneys Association, and the District Attorney of Los Angeles County.

IRA REINER
District Attorney
County of Los Angeles

By

HARRY B. SONDHEIM
Head Deputy District Attorney
Appellate Division

Counsel of Record
DIRK L. HUDSON
Deputy District Attorney

Attorneys for Amicus Curiae

BRIEF OF AMICUS CURIAE

SUMMARY OF ARGUMENT

The position of the Michigan Court of Appeal notwithstanding, no deference is due to the purported findings of the Michigan trial court. Rather, under this Court's decision in United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), in cases involving sobriety checkpoints, deference is to be given to the administrative decisions of higher ranking officials. Moreover, the Michigan courts' illogical conclusion that a low arrest rate implies lack of effectiveness (instead of the opposite) invokes an issue of law. Furthermore, the Fourth Amendment balancing of intrusiveness against important governmental interests necessarily involves a mixed question of law and fact, and necessitates this Court's review of the facts. Finally, the form in which the Michigan Court of Appeal cast its pronouncements on the constitutionality of sobriety checkpoints, as purportedly an unreviewable issue of fact, despite the limited nature of the data so far available, cannot insulate its opinion from Fourth Amendment review by this Court.

On the merits, the majority of appellate decisions dealing with the issue of the constitutionality of sobriety checkpoints have upheld them. Decisions finding constitutional difficulties include cases involving incomplete records, inadequate procedures, or invoking more restrictive state constitutional provisions. Only a few decisions found unconstitutionality per se under the Fourth Amendment. Application of this Court's test in Martinez-Fuerte, supra, 428 U.S., at 555, 96 S.Ct., at 3081, weighing the public interest against the Fourth Amendment interest of the individual, leads to the conclusion that sobriety checkpoints are necessary weapons in law enforcement's arsenal against the scourge of drunk driving while being only minimally intrusive. The same high profile technique which accomplishes deterrence of those who are otherwise tempted to

drive while intoxicated (resulting logically in low arrest rates) also serves to reduce surprise and fear on the part of law-abiding motorists, providing them with assurances of regularity, even-handedness, and minimal interference with their travel schedules.

ARGUMENT

I

NO DEFERENCE IS OWED TO THE FACTUAL FINDINGS OF THE MICHIGAN TRIAL COURT

Although the Michigan Court of Appeals treated this matter as requiring deference to the factual findings of the trial court (Sitz v. Department of State Police, 429 N.W.2d 180, 183 (Mich., 1988), no similar deference is required of this Court. This is true for several reasons.

First, in the case of routine checkpoint stops, this Court has held that "deference is to be given to the administrative decisions of higher ranking officials". (United States v. Martinez-Fuerte, 428 U.S. 543, 566-567, 96 S.Ct. 3074, 3086-3087, 49 L.Ed.2d 1116.) These officials are treated as the counterpart of the magistrate in cases of searches pursuant to warrant. (See Id., 428 U.S., at 566-567, 96 S.Ct., at 3086.) Such officials enjoy "wide discretion" (see id., 428 U.S., at 563-564, 96 S.Ct., at 3085) in factual determinations as to furtherance of the "needs of law enforcement" (see id., 428 U.S., at 562, 96 S.Ct., at 3085, fn. 15), as to "the most effective allocation of limited enforcement resources" (see id., 428 U.S., at 559, 96 S.Ct., at 3083), as to "the choice of checkpoint locations" (see id., 428 U.S., at 562, 96 S.Ct., at 3085, fn. 15), as to avoidance of any location which "bears arbitrarily or oppressively on motorists as a class" (see id., 428 U.S., at 559, 96 S.Ct., at 3083), as to "[m]any incidents of checkpoint operation" (see id., 428 U.S., at 559, 96 S.Ct., at 3084, fn.

13), and "in selecting the motorists to be diverted" for brief questioning at the secondary inspection area (see id., 428 U.S., at 563-564, 96 S.Ct., at 3085).

Within this scheme, the role of the trial and appellate courts is limited to "post-stop judicial review" as to the reasonableness of a particular exercise of administrative discretion in locating and operating a checkpoint. (See Id., 428 U.S., at 559-560, 565-566, 96 S.Ct., at 3083-3084, 3086.) Under the Fourth Amendment the determination of the reasonableness of a seizure is "a conclusion of law". (United States v. Bowles, 625 F.2d 526, 533 (5th Cir., 1980), citing United States v. Mendenhall, 446 U.S. 544, 565-566, 100 S.Ct. 1870, 1882-1883, 64 L.Ed.2d 497, fn. 5 (1980), Powell, J. concurring in part and concurring in the judgment.)

Second, this Court has long held that whether certain facts "establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law." (United States v. Pugh, 99 U.S. 265, 270, 25 L.Ed. 322, 323 (1879).)

Here, in assessing the effectiveness of sobriety checkpoints, the Michigan trial and appellate courts used the evidentiary finding of a resultant low actual arrest rate as a springboard to leap to an "ultimate fact" finding that such checkpoints had a low deterrent effect. (Sitz, supra, 429 N.W.2d, at 184.) Interestingly, the California Supreme Court utilized similar evidentiary facts to reach the opposite finding. (See Ingersoll v. Palmer, 43 Cal.3d 1321, 1339, 743 P.2d 1299, 1318 (1987).) As pointed out by that court, "the number of arrests does not necessarily measure the effectiveness of the sobriety checkpoint. If the checkpoint is properly serving its function - deterrence - it may result in no arrests at all." (Ibid.) Clearly, this Court may properly review a question of simple logic.

Third, where the question is "a mixed one of law and fact", this Court "may review the facts in order correctly to apply the law." (First Nat. Bank of Hartford, Wis. v. City of Hartford,

et al., 273 U.S. 548, 552, 47 S.Ct. 462, 463, 71 L.Ed. 767 (1927).)

Here, the ultimate touchstone for all issues under the Fourth Amendment is the standard of "reasonableness". (Delaware v. Prouse, 440 U.S. 648, 653-654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979).) Accordingly, "the permissibility of a particular law enforcement practice is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." (Id., 440 U.S., at 654, 99 S.Ct., at 1396.) Any such balancing in a particular case would seem to create a mixed question of law and fact.

Fourth, this Court has held that "[s]tate courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact." (Williams v. North Carolina, 325 U.S. 226, 236, 65 S.Ct. 1092, 1098, 89 L.Ed. 1577 (1945).)

Here, the Michigan Court of Appeals apparently held that sobriety checkpoints per se violated the Fourth Amendment because the Michigan trial court had made factual findings that such checkpoints did not significantly further the public interest in curbing drunk driving and subjectively intruded on individual liberties. (See Sitz, supra, 429 N.W.2d, at pp. 183, 185.) By way of contrast, the California Supreme Court has pointed out that "[t]he experience both in California and in other states with sobriety checkpoints has been very limited, and no definitive statistics are yet available. It would be presumptious in the extreme for this court to prohibit the use of an otherwise permissible and potentially effective procedure merely because its effectiveness is at the present time largely untested. Indeed, to do so would prevent the compilation of any data to show its effectiveness." (Ingersoll v. Palmer, supra, 43 Cal.3d, at p. 1339.) Nevertheless, the Ingersoll court went on to point to indications of effectiveness even in the absence of statistical evidence. (See Id. at pp. 1339-1340.)

The form in which the Michigan Court of Appeals cast their disposition of the federal constitutionality of roadside sobriety checks presumptiously makes this issue of concern to law enforcement throughout the United States depend on the provincial findings of a Michigan trial court based on the limited data so far available. Clearly, such procedural blinders cannot be allowed to determine the future construction of the Fourth Amendment.

II

AFTER CONSIDERING THE COMPELLING STATE INTEREST AND LIMITED INTRUSION INVOLVED, THE MAJORITY OF APPELLATE DECISIONS, HAVE HELD SOBRIETY CHECK-POINTS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT

A

Introduction

Since the authority for excluding any evidence obtained at a sobriety checkpoint must be this Court's interpretation of the reasonableness of the intrusion under the Fourth Amendment, the appellate decisions of state courts, applying the same standard, are particularly relevant. The use of sobriety check-points in numerous states is evidence of the inability to effectively deter the drunk driver through traditional methods. The highway carnage of the drunk driver is recorded daily in the media. As noted by the Illinois Supreme Court in its opinion upholding the constitutionality of the sobriety check-point, United States government surveys established that over half of the highway fatalities occurring in 1982 involved drunk drivers. "Drunk driving is particularly disturbing because it results in the loss of innocent life." (People v. Bartley, 486 N.E.2d 880 885-886 (Ill. 1985).)

The California Supreme Court has recognized the need to deter drunk driving. "The drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation." (Burg v. Municipal Court, 35 Cal.3d 257, 262 (1983).) California's highest court is supportive of "'all possible means of deterring persons from driving automobiles after drinking. . . .' [Citation.]" (Peterson v. Superior Court, (1982) 31 Cal.3d 147,

155.) The grass roots creation of organizations, such as Mothers Against Drunk Drivers, to lobby on behalf of legislation to end the alcohol-induced bloodshed on the highway, is illustrative of society's recognition of the need to restrain the drunk driver. The California Legislature has repeatedly changed the driving under the influence laws in an effort to stop the drunk driver by both increasing the likelihood of conviction and the extent of punishment.

Responding to the public's legitimate concern, law enforcement agencies throughout the nation have attempted to combat drunk driving through the use of sobriety checkpoints. This movement was not reflected in the appellate courts of the nation until 1976, when the Supreme Court of South Dakota found a particular sobriety checkpoint to be unconstitutional. (State v. Olgaard, 248 N.W.2d 392 (S.D. 1976).) But the subsequent decisions of this Court in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 139, 59 L.Ed.2d 660 (1979) and Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) gave impetus to the belief that under the reasoning of the immigration checkpoint case, United States v. Martinez-Fuerte, 428 U.S. 543, 560-561, 996 S.Ct. 3074, 49 L.Ed.2d 116 (1976), properly constituted and administered sobriety checkpoints could pass Fourth Amendment scrutiny.[1]

---

1. In *Martinez-Fuerte*, this Court observed that "[s]tops for questioning, not dissimilar to those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters." (*Id.*, 428 U.S., at 560, 96 S.Ct., at 3084, n. 14.) Of course, stops relating to the enforcement of "safety requirements" would include not only those focused on the mechanical condition of the automobile, but also those focused on the physiological condition of its driver (in essence, the car's guidance system). This Court went on to "note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." (*Ibid.*)

In *Delaware v. Prouse*, while invalidating a random license check on patrol, this Court was careful to state, "[t]his holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise

(continued...)

As demonstrated, there is a nationwide movement to initiate sobriety checkpoints as a means of deterring the drunk driver. Following In re Lance W., 37 Cal.3d 873 (1985), the California courts are required to use the standard applied by this Court (a standard which is used by the courts of most other states), i.e., the propriety of the intrusion under the Fourth Amendment. Utilizing that standard, the California Supreme Court has upheld the constitutionality of sobriety checkpoints. (See Ingersoll v. Palmer, 43 Cal.3d 1321, 1325 (1987).) Of the other appellate courts that have addressed this issue the Supreme Courts of New Hampshire and Pennsylvania have opted to not apply the Fourth Amendment but to simply rely on state constitutional grounds. (State v. Koppel, 499 A.2d 977, 983 (1985); Commonwealth v. Tarbert, 502 A.2d 221 (Pa. 1985).)[2]

B

Survey of Sister State Decisions

In ruling on the stop of an individual walking in an alley, this Court in Brown said that "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity

---

1. (...continued)
of discretion. Questioning of all incoming traffic at roadblock-type stops is one possible alternative." (*Id.*, 440 U.S., at 663, 99 S.Ct., at 1401.)

In California, the Attorney General relying on these cases and those of other states concluded that "California law enforcement agencies may lawfully utilize checkpoints in the detection and apprehension of persons driving under the influence of intoxicating substances if sufficient safeguards are taken to minimize the intrusion of a motorist. (67 Op.Cal.Atty.Gen. 471 (1984).)

2. As to the exclusion of evidence obtained from sobriety checkpoints, that option is foreclosed in California by California Constitution, Article I, section 28, subdivision (d) and *In re Lance W., supra*, at 896.

of the interference with individual liberty." (Brown v. Texas, supra, at 50-51.) To insure that an individual's reasonable expectation of privacy is not subject to arbitrary invasion at the discretion of the officer in the field "the Fourth Amendment requires that a seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitation on the conduct of individual officers." (Id., at p. 51.)

In applying this test and the rationale contained in United States v. Martinez-Fuerte, appellate courts in Arizona, California, Georgia, Illinois, Indiana,[3] Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington have concluded that properly administered sobriety checkpoints are constitutional under the Fourth Amendment.[4]

---

3. When the Indiana Court of Appeal upheld a sobriety checkpoint in *State v. Garcia*, 481 N.E.2d 148, 153-154 (Ind.App. 1985), it specifically rejected another appellate opinion holding the procedure unconstitutional. (*See State v. McLaughlin*, 471 N.E.2d 1125, 1130-1134 (Ind.App. 1984).) Thus, the issue remains unsettled in Indiana.

4. The particular holdings of each state and year are as follows:

Year	State	
1989	Indiana	*Snyder v. State*, 538 N.E.2d 961 (Ind. 1989)
1988	Missouri	*State v. Welch*, 755 S.W.2d 624 (Mo. 1988)
1988	Vermont	*State v. Record*, 548 A.2d 422 (Vt. 1988)
1988	Louisiana	*State v. Church*, 530 So.2d 1235 (La. 1988)
1987	California	*Ingersoll v Palmer*, 743 P.2d 1299 (Cal. 1987)
1987	Oregon	*Nelson v. Lane*, 743 P.2d 692 (Ore. 1987)
1987	New Mexico	*City of Las Cruces v. Betancourt*, 735 P.2d 1161 (N.M. 1987)
1986	Washington	*Fury v. City of Seattle*, 730 P.2d 62 (Wash. 1986); (continued...)

In these states the appellate courts concluded that in light of the compelling state interest in deterring and detecting drunk drivers, the minimal intrusion involved and the lack of discretion afforded the officers in the field, the sobriety checkpoint satisfied the reasonableness mandate of the Fourth Amendment.

Of the states that have found constitutional difficulties with the particular sobriety checkpoints in question, at least two have subsequently upheld sobriety checkpoints. (Compare Commonwealth v. McGeoghegan, 449 N.E.2d 349, 350-353 (Mass. 1983), where record did not establish lack of arbitrar-

---

4. (...continued)

(Wash. 1988)		but see *City of Seattle v. Mesiani*, 755 P.2d 775
1985	Illinois	*People v. Bartley*, 486 N.E.2d 880 (Ill. 1985)
1985	Vermont	*People v. Martin*, 496 A.2d 442 (Vt. 1985)
1985	Virginia	*Low v. Commonwealth*, 337 S.E.2d 273 (Va. 1985)
1985	Massachusetts	*Commonwealth v. Trumble*, 483 N.E.2d 1102 (Mass. 1985)
1985	Indiana	*State v. Garcia*, 481 N.E.2d 148 (Ind.App. 1985), but see *State v. McLaughlin*, 471 N.E.2d 1725
(Ind.App. 1984)		
1984	Arizona	*State v. Superior Court in and for County of Pima*, 691 P.2d 1073 (Ariz. 1984)
1984	New York	*People v. Scott*, 473 N.E.2d 1 (N.Y.App. 1984)
1984	Maryland	*Little v. State*, 479 A.2d 903 (Md.App. 1984)
1984	Georgia	*State v. Golden*, 318 S.E.2d 693 (Ga.App. 1984)
1983	Kansas	*State v. Deskins*, 673 P.2d 1174 (Kan. 1983)
1983	Kentucky	*Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky.App. 1983)
1983	New Jersey	*State v. Cocoma*, 427 A.2d 131 (N.J. Super. L. 1980)

iousness with Commonwealth v. Trumble, 483 N.E.2d 1102 (Mass. 1985) and State ex rel. Ekstrom v. Justice Court of State, 663 P.2d 992, 993-996 (Ariz. 1983), where record was inadequate as to effectiveness of roadblocks with State v. Superior Court in and for County of Pima, 691 P.2d 1073, 1075, 1077 (Ariz. 1984).) Florida's appellate court has held that while some sobriety checkpoints may be constitutionally permissible, the one in question failed to satisfy the requirements of the Fourth Amendment. (Jones v. State, 459 So.2d 1068, 1072-1070 (Fla.App. 1984).)

Of the minority of states with appellate decisions prohibiting sobriety checkpoints [5], New Hampshire and Pennsylvania relied on state constitutional grounds [6], and South Dakota ruled

5. See *State v. Henderson*, 756 P.2d 1057 (Ida. 1988), listing 15 state courts as having suppressed evidence resulting from sobriety checkpoints (i.e. Arizona, Florida, Indiana, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, and Washington), and 19 state courts as having upheld sobriety checkpoints (Arizona, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Ohio, and Virginia). (See *Id.* 756 P.2d, at 1062, and fn. 3 [giving citations].) However, of those suppressing evidence, only 3 states, "[t]he states of Oregon, Oklahoma, and Washington have adopted *per se* rules which provide that drunk driver roadblocks are unconstitutional under any circumstances. (*Id.*, 756 P.2d, at 1063, citing *State v. Boynnorsky*, 743 P.2d 711 (Ore. 1987), *State v. Smith*, 674 P.2d 711 (Okla. 1984), *City of Seattle v. Mesiani*, 755 P.2d 775 (Wash. 1988).) The *Henderson* court, itself, invalidated a sobriety checkpoint, but did so exclusively on state constitutional grounds, declining to adopt a rigid *per se* rule, and expressing no view as to the constitutionality of roadblocks established pursuant to administrative order. (*Henderson*, *supra*, 756 P.2d, at 1063, and fn. 4.)

6. See *Koppel*, *supra*; *Tarbert*, *supra*. The Supreme Court of Washington has ruled that a particular sobriety checkpoint program established without "authority of law" violated the more restrictive state constitution. The court in dicta went on to opine that the program gave police officers unbridled discretion to conduct intrusive searches, thereby violating the Fourth Amendment. (See *City of Seattle v. Mesiani*, 755 P.2d 775 (Wash. 1988).) That court had previously ruled that a particular checkpoint set up to stop motorists for driver's license and vehicle check did not meet the criteria of *Delaware v. Prouse*. The latter case did not involve a sobriety checkpoint,

(continued...)

prior to the United States Supreme Court decision in Prouse and Brown. (See State v. Olgaard, 248 N.W.2d 392 (S.D. 1976).) In State v. Muzik, 379 N.W.2d 599 (Minn. 1985), the Minnesota Supreme Court held that the evidentiary showing made by the state was not sufficient to justify the use of the checkpoint. (Id., at p. 604.) In State v. Crom, 383 N.W.2d 461 (Neb. 1986), the Nebraska Supreme Court issued a limited ruling that the checkpoint violated Brown and Prouse because the stopping of any vehicle was left to the unbridled direction of the police officer.

Only a small minority of state courts (including Oregon, Oklahoma, and Washington) have adopted per se rules which provide that sobriety checkpoints are unconstitutional under any circumstance. (See e.g. State v. Boyanovsky, 743 P.2d 711 (Ore. 1987), State v. Smith, 674 P.2d 711 (Okla. 1984) [7],

6. (...continued)
and the court concluded that this particular stop, which resulted in the discovery of dangerous drugs, contained the unconstrained and unfettered discretion condemned in *Prouse*. (*State v. Marchand*, 706 P.2d 225 (Wash. 1985).)

7. Although the Oklahoma court distinguished the sobriety checkpoints from the roadblocks approved in *United States v. Martinez-Fuerte*, *supra*, it never discussed the significance of *Delaware v. Prouse* or even cited *Brown v. Texas* in its decision. It concluded that the primary purpose of the checkpoints was to seek out driving under the influence offenders, not, as law enforcement claimed, to identify and remove violators of driver license and car registration provisions.

The case contains no discussion of the deterrent purpose nor the standard announced in *Brown v. Texas*. Without considering the following criteria, *i.e.*, (1) gravity of public concerns served by seizure, (2) degree seizure advances public interest, and (3) severity of the interference with individual liberty, the Oklahoma court concluded that this checkpoint was no different than any other established to apprehend a particular type of criminal. (*State v. Smith*, 674 P.2d 562, 564 (Okla.Cr. 1984).) The entire thrust of the Oklahoma decision is reflected in its observation that such sobriety checkpoints are no different than fixing a checkpoint outside of every shopping center to check existing shoppers for sales receipts. (*Id.*, at 564.) The court relied only on the requirement of reasonable objective suspicion and ignored the language of *Brown v. Texas* regarding the standard to be applied.

City of Seattle v. Mesiani, 755 P.2d 775 (Wash. 1988), these being the 3 state court decisions cited in State v. Henderson, 756 P.2d 1057, 1063 (Idaho 1988).) Two more recent decisions (including the opinion below) might arguably be added to this list. (See Higbie v. State, 1989 WL 118822 (Tex.Cr.App. 1989), and Sitz v. Department of State Police, 429 N.W.2d 180 (Mich. 1988).) It appears that these are the only state courts totally rejecting the arguments currently being accepted by the states finding sobriety checkpoints constitutional under the Fourth Amendment.

C

Independent Analysis

Clearly, a primary purpose of the checkpoint herein under consideration and in those upheld as constitutional has been the deterrence of drunk drivers. Individuals discovered by such checkpoints, unlike many other criminals, are not committing an anti-social act for financial gain or personal satisfaction. Rather, they generally believe (1) they are not intoxicated and (2) they will not be caught and can make it to their destination. What is unique about drunk drivers is that they make the final decision to drive while intoxicated. Thus, high visibility programs by law enforcement, such as announced sobriety checkpoints, heighten the potential drunk driver's awareness (1) of the potential of being stopped and (2) of society's concern with drunk drivers.

While it is frequently argued that other means of enforcement are more effective, that issue is one of reasonableness. While it may be true that increased patrols observing erratic driving may remove more drunk drivers from the streets by taking them into custody, the answer is not to be found simply in the number of arrests. Indeed, if the advance publicity and physical presence of the sobriety checkpoints are an effective means of deterring drunk drivers, fewer drunk drivers should

be arrested. The measurement of the sobriety checkpoints effectiveness cannot be made simply on the number of drunk drivers detained. (See Ingersoll v. Palmer, supra, 43 Cal.3d, at p. 1339.)

Despite increased sentences and legislative reform, drunk driving continues as a major societal concern and it has become evident that additional forms of deterrence are necessary. The carnage caused by drinking and then driving is so serious it warrants resort to both types of action, the stopping of erratically driven vehicles and the use of sobriety checkpoints to deter those who would drive after drinking and to detect those drunk drivers who have not driven in an erratic manner. (Cf. People v. Bartley, supra.)

Just because the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, in itself, render a search unreasonable. Likewise, the alleged effectiveness of other means of deterrence, i.e., strict enforcement of the statute, does not render a properly publicized and operated sobriety checkpoint, unreasonable, and hence in violation of the Fourth Amendment. (Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 2531, 37 L.Ed.2d 706 (1973); see also United States v. Martinez-Fuerte, supra, 428 U.S., at 556, 96 S.Ct., at 3082, 49 L.Ed.2d 1116, fn. 12; and United States v. Sharpe, 470 U.S.675, 687, 105 S.Ct. 1568, 1576, 84 L.Ed.2d 605 (1984).)

Amicus does not ask this Court to blindly follow the appellate decisions of the majority of state court jurisdictions which have confronted the issue of the constitutionality of sobriety checkpoints. Rather we request that this Court apply the same analysis, one directed by the Fourth Amendment, utilized by this Court in Brown, Martinez-Fuerte, and Prouse. If this is the correct test, this Court will ultimately conclude as did these other appellate courts that the legitimate public purpose served by the sobriety checkpoint, i.e., deterrence and apprehension, outweigh a minimal intrusion so long as the officer's discretion is constitutionally limited.

Whether the seizure was a reasonable one under the Fourth Amendment is determined by balancing the public interest against the objective and subjective intrusion resulting from the stop. (People v. Bartley, supra.)

In applying this test, the appellate courts have repeatedly recognized the paramount public interest in removing the drunk driver from our highways. In United States v. Brignoni-Ponce, 422 U.S. 873, 878-879, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975), this Court noted the nation's major public interest in maintaining the integrity of its borders. Likewise, both this Court and the California Supreme Court have expressed the belief that the drunk driving problem is a major public concern. (See South Dakota v. Neville, 459 U.S. 553, 558, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983); Burg v. Municipal Court, supra, at 262.)

Society's interest in reducing the tremendous loss of life and property damage caused by drunk drivers is no less compelling than its interest in detecting illegal aliens. While illegal immigration may cause severe economic, social and public health problems, the drunk driver is single-handedly responsible for over half of the highway fatalities. These fatalities are numbered in the tens of thousands each year. Drunk driving is not simply another crime. Like illegal immigration it has become a major social concern separate and distinct from the traditional crime problem.

Simply because a problem is of major concern to society does not render every means of deterrence or detection constitutional. No one seeks the police state envisioned by the court in Oklahoma. (State v. Smith, supra, at 564.) The means employed must serve the societal concern to a significant degree. There is no requirement that the means be the most effective method. The issue is not whether increased patrols or sobriety checkpoints are more effective in removing the drunk driver from the highways. Rather it is whether checkpoints sufficiently serve the recognized societal interest to justify the

intrusion involved. (See State v. Church, 530 So.2d 1235, 1241-1242 (La. 1988), Jones, J., concurring.)

The sobriety checkpoint is not simply a roadblock to detect criminals. Contrary to the view of the Oklahoma court, this means is specifically designed to deter or apprehend drunk drivers when they are about to, or are actually committing, the offense. Unlike the illegal immigrant or a possessor of contraband, the drunk driver may only commit the offense by using the public highways and that is where sobriety checkpoints are established.

Just as the national interest in the integrity of its borders and the arguably limited efficiency of the permanent checkpoint were sufficient to support immigration checkpoints as the means of the intrusion, the public interest in reducing the loss of life and property due to intoxicated drivers, coupled with a means directed toward the particular offense, is sufficient to overcome the relatively minor intrusion involved. The high profile sobriety checkpoints serves as a reminder to all those drinking that the chances of apprehension are increased. Whether or not this is true is irrelevant as long as the potential drunk driver perceives an increased danger of detection.

The checkpoint does advance the state's interest in deterring the drunk driver, even more so than the immigration checkpoint deters the illegal alien intent on entering the country. The level of interference has been limited by the procedures employed, i.e. (a) advance publicity, (b) short duration of stop, (c) limited discretion given the officer in the field. These were present in the cases cited and are present in the current checkpoint under consideration.[8]

Consequently, this Court should conclude after applying the Fourth Amendment standard of reasonableness, that not only may a sobriety checkpoint designed to deter and detect those driving under the influence be constitutional, but as

---

8. See Footnote 4.

pointed out by the petitioners and supported by the record, the sobriety checkpoint in question was constitutional.

CONCLUSION

This Court stated almost thirty years ago that "the increasing slaughter on our highways, most of which could be avoidable,

now reaches the astounding figure only heard of on the battlefield." Breithaupt v. Adam, 352 U.S. 432, 439 [1 L.Ed.2d 448, 77 S.Ct. 408] (1957), emphasis added.) The passage of time has only increased the need to uphold the circumscribed procedures of the sobriety checkpoint.

Respectfully submitted on behalf of the
Appellate Committee of the
California District Attorney's
Association, and the District Attorney
of Los Angeles County

IRA REINER
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head Deputy District Attorney
Appellate Division

DIRK L. HUDSON
Deputy District Attorney
Attorney for Amicus Curiae